(1) Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ALAN RICHARD MYERS,
Petitioner,

vs.

C.A. TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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141 pp

QUESTIONS PRESENTED

Does the Sixth Amendment require that whether "appropriate" and "reasonable" investigations have been made, the question must be resolved by the characteristics of the particular case to resolve claims that counsel has provided ineffective assistance?

Has the Ninth Circuit so trivialized petitioner's claims, ignored the precedent from its own court as well as that from other circuits as provided in petitioner's briefs, that it failed to meaningfully review the district court's and the state court's findings on petitioner's Sixth Amendment claim?

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Petitioner, Alan Richard Myers, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit that affirmed the judgment of the United States District Court for the Central District of California that denied his habeas petition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, *Myers v. Terhune*, case number 00-56505, appears at Appendix C to the petition and is unpublished.

The United States District Court's judgment of dismissal and order adopting the findings and recommendation of the United States magistrate judge, *Myers v. Terhune*, case number ED CV98-215-VAP(E), appear at Appendixes D and E, respectively, and are unpublished.

The report and recommendations of the United States District Court magistrate judge, *Myers v. Terhune*, case number ED CV98-215-VAP(E), appear at Appendix F.

The California Supreme Court's denial of Petitioner's petition for review, *People v. Myers*, case number S062347, appears at Appendix M.

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two, *People v. Myers*, case number E016578, and *In re Myers*, case number E020323, affirming Petitioner's conviction and sentence of life without the possibility of paroles, appears at Appendix O.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the United States District Court for the Central District of California on September 25, 2001. (App. C.) A petition for rehearing was timely filed. The United States Court of Appeals for the Ninth Circuit denied Petitioner's petition for rehearing and rehearing en banc on November 6, 2001. (App. B.) The instant Petition for Writ of Certiorari is filed within 90 days of that order.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On October 1, 1993, petitioner was indicted in the California Superior Court for Riverside County for murder (Pen. Code[1], § 187) with allegations that he personally used a firearm and that he intentionally killed the victim while lying in wait, within the meaning of sections 12022.5, subdivision (a), and 190.2, subdivision (a)(15), respectively. (CT[2] A-C.)

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1 Hereinafter, all references are to the Penal Code unless otherwise noted.

2 CT refers to the clerk's transcript.

The People elected not to seek the death penalty. (CT 5, 87-89.) The first trial resulted in a hung jury and a mistrial was declared. (CT 81.) On July 8, 1994, retained counsel was relieved as attorney of record and the public defender was appointed. (CT 82-85.) The second trial commenced on December 8, 1994, and consumed 22 days in trial. (CT 98, 100-106, 119-145, 150, 157.) On January 30, 1995, after deliberating for two days, the jury found petitioner guilty of first degree murder (§ 187) and found true the charged allegations. (CT 148-157.) (CT A-C.)

On February 27, 1995, the public defender was relieved and new retained counsel substituted. (CT 218-219.) On June 9 and 12, 1995, petitioner's motion for new trial was heard. Petitioner alleged (1) that the prosecution intentionally suppressed evidence, (2) that he was denied his Sixth Amendment right to the effective assistance of counsel at trial, (3) and that there was newly discovered material evidence of his innocence. The motion was denied and petitioner was sentenced to state prison for life without the possibility of parole consecutive to a four year sentence for the firearm use allegation. (CT 432-433, 443-445.)

Petitioner appealed to the California Court of Appeal, Fourth Appellate District, Division Two (*People* v. Myers, E016578). On October 31, 1996, petitioner filed a petition for writ of habeas corpus in the Riverside County Superior Court in *In re Myers*, CR 51809, alleging substantial additional newly discovered evidence to support the claims (1) that the prosecution intentionally suppressed evidence, (2) that newly discovered evidence undermined the prosecution's entire case and pointed clearly to petitioner's innocence, and (3) that petitioner was denied his Sixth Amendment right to the effective assistance of counsel at trial.

The Riverside County Superior Court issued an order to show cause to the District Attorney of Riverside County. On March 25, 1997, after further briefing by both sides, the

court denied the petition. Immediately thereafter, a habeas petition was filed in the California Court of Appeal, Fourth Appellate District, Division Two (*In re Myers*, E020323), with the same allegations that had been raised below. Petitioner's request to consolidate the petition with his appeal was granted. The appellate court's opinion was filed on May 21, 1997, affirming his conviction and denying his petition. (App. O.)

Petitioner sought review in the California Supreme Court, *People v. Myers* and *In re Myers*, S062347. On September 3, 1997, the Court denied petitioner's petition for review. (App. M.)

On September 4, 1998, Petitioner filed a petition for writ of habeas corpus in the United States District Court, Central District of California (*Myers v. Terhune*, EDCV 98-215.) The petition contended that petitioner was denied his Sixth Amendment right to the effective assistance of counsel at trial.

On December 6, 1999, an evidentiary hearing was heard and five witnesses testified. (App. F, G.) On June 28, 2000, the Magistrate Judge's Report and Recommendation was filed and recommended denial of the petition. (App. F.) Petitioner's Objections were filed. On July 25, 2000, the court adopted the Recommendations and denied Petitioner's petition. (App. E, F.) Petitioner appealed.

On September 25, 2001, the United States Court of Appeal for the Ninth Circuit affirmed the District Court's decision (*Myers v. Terhune*, 00-56505.) (App. C) On November 6, 2001, the Ninth Circuit denied petitioner' petition for rehearing and rehearing en banc. (App. A, B.)

REASON WHY THIS PETITION SHOULD BE GRANTED

THE NINTH CIRCUIT TRIVIALIZED PETITITIONER'S CLAIMS AND FAILED TO FOLLOW THAT COURT'S PRECEDENT AS WELL AS THE PRECEDENT OF OTHER CIRCUITS THAT THE SIXTH AMENDMENT REQUIRES COUNSEL TO CONDUCT REASONABLE AND APPROPRIATE INVESTIGATIONS IN LIGHT OF THE CIRCUMSTANCES OF EACH CASE AND THE DEFENSE

Review is necessary because the United States Court of Appeal for the Ninth Circuit has entered a decision in conflict with the decisions of that Court as well as other United States court of appeals and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

A. BACKGROUND

Petitioner, a building inspector, bricklayer, and father of two young boys, is serving a life sentence without the possibility of parole for a murder he could not have committed. (RT[3] 553, 595, 1989-1990.) At trial, it was conceded that at 9:50 p.m. he was 65 miles from the crime scene. His alibi was confirmed by the family he was living with as well as the telephone records for their residence that

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3 "CT" and "RT" refer to the Clerk's Transcript and Reporter's Transcript on petitioner's state appeal. Appendix G refers to the Reporter's Transcript of the district court evidentiary hearing that has been lodged herewith. The exhibits from petitioner's state trial are noted simply as exhibits. The exhibits introduced at petitioner's motion in state court for new trial are noted as NT exhibits. The exhibits accompanying petitioner's habeas petition in the federal district court are noted as HC exhibits. The exhibits introduced into the district court evidentiary hearing are noted as DC exhibits.

conclusively verified that he had been in the residence at 9:50 p.m. when he placed a telephone call to his wife's residence. (RT 995, App. G 11-14, DC exhs. 2-3, App. J-L, Exhibit 80, Charts 56-59.) The victim was shot outside in a parking lot behind the victim's business 65 miles away. (RT 87-91, 161, 1090-1098, 1230, App. J.) The state's theory, unsupported by any direct evidence, was that the shots that killed the victim were fired between 8:05 p.m. and 8:45 p.m., a time when petitioner's alibi was not as well established. (RT 2351-2352.) After the verdict was in, two witnesses were discovered that heard gunshots at 9:30 p.m., a time when petitioner could not have been present. (CT 381, App. G 47-49, RT 2471-2473, 2477, 2480-2482, 2491-2493, 2496, 2499, 2503-2507, DC exh. 4.) One of the witnesses was an employee of an automobile agency to the immediate west of the crime scene. (RT 2471-2473, 2480-2481.) The other witness supervised the cleaning crews of the automobile agencies both to the north and west of the crime scene. (NT exh. A, RT 2488-2490.) One of the witnesses was located by the simple straightforward expedient of subpoenaing the employee records of the automobile agency to the immediate west of the crime scene. (CT 381, App. G 47-49.)

During state post verdict proceedings, it was established that defense counsel made no effort to look for witnesses to the sound of gunfire at the automobile agency west of the crime scene. He made no attempt to contact the cleaning crews that cleaned the auto dealerships to the immediate west and north of the crime scene. He made no attempt to subpoena the employee records of any of the businesses surrounding the crime scene to insure that he had contacted all possible witnesses to the sound of, or the absence of the sound of, gunfire. He had not even thought of issuing a subpoena for the employee records. He did not know whether he had talked to all of the adjoining businesses' employees that had been on duty on the night of the homicide.

And, he never even went to the dealership to the west of the crime scene. He never talked to Mr. Enyart, who supervised the cleaning crews at the adjoining dealerships, who had been identified in the discovery defense counsel had been provided, and had heard two gunshots fired at 9:30 p.m., as he testified at the evidentiary hearing in the district court. Defense counsel explained that he had attempted to show that the homicide occurred later in the evening, because it would conclusively show that petitioner was some 65 miles away at 9:30 p.m. (CT 384-385, 421, RT 2567-2581, App. G.)

B. READILY AVAILABLE WITNESSES FOUND AFTER PETITIONER'S TRIAL PROVED THAT HE WAS 65 MILES AWAY WHEN THE SHOTS WERE FIRED

Two witnesses, Messrs. Enyart and Ramos, provided declarations and testified at the hearing on Petitioner's motion for new trial. (CT 411-416, RT 2469-2510.) Mr. Enyart had a contract to clean three of the four auto-dealerships that were adjacent to the property occupied by the victim [the Shop], the scene of the homicide, and the adjoining business [On Guard, a security firm]. (RT 2489-2490.) The dealership directly to the north is Frahm Chrysler Plymouth and the dealership directly across Hamner to the west is Phillips Mazda Pontiac. (NT exh. A, RT 2488.) Mr. Enyart worked every night of the year, and on weekdays he began work at 9:00 p.m. (RT 2490, 2502, 2505-2506.) He would not have been at work as early as 8:10 p.m. (RT 2502.)

At about 9:30 p.m., on the night of the homicide, as established in his mind by the subsequent police activity at the scene later that night, Mr. Enyart was outside in the lot at Frahm Chrysler Plymouth, immediately north of the property occupied by the Shop and On Guard, and Enyart heard two gunshots spaced about two seconds apart. (RT 2491-2493, 2496, 2499, 2505-2507.) He had been talking to one of his employees, but he did not remember which employee. (RT 2493.) Enyart was facing west towards Hamner and the shots

seemed to come directly from the south. (RT 2491-2492, 2503.) Enyart had experience with firearms and was convinced that he heard gunshots. (RT 2492.) Five minutes after hearing the shots, he noticed that there were some people out in front of Phillips Mazda Pontiac; the agency was still open. (RT 2493-2494.) That same night, Enyart discussed what he heard with four or five salesmen at the Phillps Mazda Pontiac dealership and asked them if they heard anything. One thought he had heard a couple of backfires and another thought they were gunshots. By the date of the hearing, Enyart could not recall who the salesmen were. (RT 2493-2495, 2504-2505.) Around midnight, Enyart observed all the police activity around the shop and stopped to inquire whether there was any reason for concern for his employees. (RT 2491-2493, 2506-2507.) The officer that he spoke with would not tell him what happened and this contact lasted less than two minutes. (RT 2495, 2506-2507.) Enyart did not remember whether he mentioned to the officer that he had heard gunshots. (RT 2503.) Enyart vaguely remembered being contacted thereafter by someone in law enforcement, but he could not remember whether it was in person or by telephone. (RT 2493, 2507-2508.) Enyart expressed that he had no reason not to share the information with law enforcement. (RT 2505.) That was the first time in his six-year experience out there that he had heard gunshots. (RT 2507.) Until he was contacted by defense investigator Danny Davis in 1995, after Petitioner's second trial, he had never connected in his mind the shots that he heard with the killing that occurred. (RT 2508.)

Mr. Enyart also testified at the December 6, 1999 evidentiary hearing in the district court. Even though four and one-half years had passed since he testified last and seven years since the night of the homicide, his testimony remained substantially unchanged. (App. G 23-39.) Enyart used the aerial photograph, DC exhibit 4, to point out the locations of

The Shop, On Guard, and the surrounding automobile dealerships. (App. G 23-33.)

The second percipient witness to the sound of gunfire was Michael Ramos. Mr. Ramos testified that in December 1992, he was employed by Phillips Mazda Pontiac, across the street from the Shop. (RT 2471-2472.) He worked the 2:00 p.m. to 9:00 p.m. shift, although since it was a commissioned sales job, his hours were not always reflected on the time clock. He had worked the night of the homicide. (RT 2471-2473, 2480-2481.) At about 9:20 p.m. or 9:25 p.m., he went outside in front of the agency by the fountain to take a smoke break. (NT exh. A, RT 2472-2474.) They had a client inside, and Ramos was covering the front of the agency because it was their policy to remain open as long as they had a client in the dealership. (RT 2482.) The fountain was on and soft music was playing in the background. (RT 2479.) Traffic was very mild. (RT 2480.) He heard two gunshots, separated by about two seconds. (RT 2472-2473, 2477, 2481-2482.) There is a 7-Eleven store on the southeast corner of Second Street and Hamner, southeast of Mr. Ramos' position. (RT 2474-2475.) Ramos thought the gunshots came from the 7-Eleven. (RT 2475-2478.) A freeway bank is east of and rises above the rear of the Shop. (RT 2475-2476.) Ramos estimated that the back of the Shop was about 200 or 300 yards east of Mr. Ramos' position. However, the distance was less; the parking lot in front of Phillips Mazda Pontiac, the width of Hamner, the parking lot in front of the Shop, and the length of the Shop were all that separated Ramos from the back of the Shop. (NT exh. A; RT 2481; DC exhs. 4, 11; App. G 43.) Ramos remembered leaving the agency that night at about 10:00 or 10:15 p.m. (RT 2480-2481.) Ramos had discussed with several people about hearing the shots. (RT 2477-2479, 2482-2484.) He had served in Vietnam and was familiar with the sound of gunshots, and he was convinced that is what he heard. (RT 2477.) The first time

Ramos discussed with someone in an official capacity what he had heard was when he was approached by Investigator Davis about six weeks prior to Ramos' appearance at the motion for new trial. (RT 2478.)[4]

As detailed in NT exhibit A and described by Investigator Davis, there were no buildings between the parking lot behind the shop and Second Street to the south. (RT 2510-2511.) A wall less than three feet in height is on the south border of the parking lot behind the shop. (RT 2511, 2540-2541, 2550-2551, 2589.) The Shop is constructed of tilt-up concrete walls. (RT 2531-2532, 2588.) The On Guard building is of similar construction (RT 2588-2589) and is two-stories high (RT 2531).

It is apparent that before law enforcement limited their investigation to Petitioner, they believed that the homicide occurred later in the evening than the prosecution's theory had been for the trial. After the motion for new trial, defense efforts led to Patricia and Ray Thomas, at the time of the homicide and in the following months, they lived across the street from Debbie Norris, the victim's estranged wife. They were interviewed. (HC exhs. A & B, App. K, L.) They became suspicious by a change in activity at Ms. Norris' residence after the death of the victim, and Mr. Thomas called Detective Spidel. (HC exhs. A & B.) On January 4, 1993, Spidel used the Thomas' residence to stake out Ms. Norris' residence. While Spidel was ensconced in the Thomas' residence, he told Ms. Thomas that the victim had been killed between 10:00 p.m. and midnight. Spidel said that he believed the shooter was between five feet, four inches and five feet, six inches tall, because of the angle of the bullet's

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4 Despite substantial effort, petitioner was unable to locate Mr. Ramos for the December 6, 1999, evidentiary hearing in federal district court. (APP. G 48-49.)

entry. (HC exh. A.)[5] (The victim was six feet, three inches tall (RT 324) and petitioner is five feet, ten inches tall (CT 435).)

C. EXPERT TESTIMONY AT THE EVIDENTIARY HEARING AFFIRMED COUNSEL'S DUTY TO IDENTIFY AND INTERVIEW ALL POTENTIAL WITNESSES

Attorney Edward Rucker testified at the December 6, 1999, hearing. He is a graduate of Berkeley's Bolt-Hall with over 30 years experience as a criminal trial attorney, the first 14 years spent in the Los Angeles Public Defender's office and his last position there was head deputy. He is a California State Bar licensed criminal law specialist and has tried approximately 50 homicide cases, ten of them were capital cases. He has also practiced before the California Supreme Court and has taken federal capital habeas appointments. He has been a regular lecturer before public defender's associations, bar associations, district attorney associations, and at the judge's college. In 1992, he was awarded by the Los Angeles Bar as the best trial lawyer of the year. He has testified as an expert on criminal law in both California and federal courts. He has also testified before California Legislative Committees as well as a committed from the American Bar Association. (App. G 52-56, I.)

Mr. Rucker testified that the prevailing professional norms at the time of Petitioner's trial in 1994 had not undergone any significant changes relevant to the issues in

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5 At the December 6, 1999 evidentiary hearing in federal district court, petitioner called Ms. Thomas to testify, but on objection of respondent, the magistrate judge found that her proffered testimony was irrelevant to the issue of whether petitioner had been denied the effective assistance of counsel, but the court acknowledge that her testimony would be relevant on retrial to the issue of petitioner's guilt or innocence. (APP. G 20-24.) However, for the reason that her proffered testimony cast doubt on petitioner's guilt, her testimony was also relevant to the prejudice prong of petitioner's ineffective assistance of counsel claim.

this case. Mr. Rucker's opinion is based on his personal experience, conversations that he has had with colleagues, defense bar lectures, and other written materials. (App. G 58.)

Mr. Rucker described as "very, very grave" the responsibility a defense attorney has in representing someone charged with murder, especially where a special circumstance has been alleged. The defendant literally places his life in his attorney's hands. (App. G 59.)

Mr. Rucker explained that it is not wise for defense counsel to rely on the investigative efforts of law enforcement. Once they believe they have identified the perpetrator, they make no effort to look for evidence inconsistent with their theory. They may be pursuing a line of investigation that has nothing at all to do with the defense theory. Secondly, the direction of law enforcement interviews is only based on the issues they are interested in. As an example, to ask someone if they heard a gunshot at any time that evening is one way to phrase the question. By contrast, to ask if someone was in a position to have heard a gunshot at a particular time is a question that may be just as important for the defense. (App. G 59-61.)

Mr. Rucker explained that it was not wise to rely on an employer to determine if any of his employees had heard anything. You do not know how committed or conscientious that civilian would be in approaching the task. Further, the employer has inconsistent interests in obligating himself to the inconvenience and possible cost of loosing the employee's time for several work days while the employee is caught up in the trial. (App. G 61-62, 95.) In Mr. Rucker's experience, people are universally reluctant to "get involved" in criminal cases, even in capital cases were the stakes are the highest. (App. G 72, 95.)

Mr. Rucker explained that if it appears that it is possible that someone may have relevant, probative

information about the case, you have to talk to him to see if it supports your theory. It is just as important to find information that does not support your theory, because you do not want to put on a defense where rebuttal evidence will destroy it. (App. G 62.)

Mr. Rucker explained that homicide cases are too serious to not have an experienced criminal investigator that is familiar with crime scene evidence, police techniques, and the use of the subpoena and subpoena duces tecum. A defense attorney is always better served by using an experienced criminal investigator than by relying on himself to do the investigation. It is a time-consuming, difficult task that would detract from the attorney's other responsibilities. Additionally, to get someone to talk is a skill. It is a very common reaction for people not to want to become involved. People do not contact investigators or counsel and volunteer information. Thus, skill is required to get people to cooperate and sometimes just being a lawyer provides an additional barrier to that cooperation. Also a skilled investigator will be more sensitive to detect when new avenues of investigation surface during the interview. (App. G 62-64.)

Mr. Rucker explained that a thorough investigation is essential to see if the evidence supports the defense theory as well as to learn if there is contradicting evidence. (App. G 65-66, 86-88.)

In Mr. Rucker's opinion, defense counsel's preparation in the instant case was willfully inadequate and fell below the professional norms prevailing in 1993 and 1994. (App. G 68, 75.) The prosecution's case rested exclusively on circumstantial evidence; there was no witness to the homicide and there was no physical evidence to tie Petitioner to the homicide. Motive and opportunity were the primary prosecution theory. Defense counsel presented an alibi defense; probably the most time-honored defense available. That defense required that the time of the homicide

be established and Petitioner's whereabouts at that time be established. The prosecution had conceded that the homicide must have occurred during a very narrow period of time. The discovery materials provided counsel indicated that the shooting took place outside in a relatively open area, there were commercial businesses that surrounded the crime scene, these businesses were open, there was a cleaning crew identified working at one of the dealerships, and a visit to the scene would have made all of this most apparent. (App. G 68-70.) The fact that a firearm had been employed indicated that witnesses to the sound of a gunshot could establish the time of the assault, particularly since it occurred outside. One merely had to go to the adjacent businesses to determine which employees were present that evening and interview them. This would have produced Messrs. Enyart and Ramos. With or without an investigator, the task was merely to get the employee list from the adjoining businesses, either voluntarily or by subpoena. (App. G 71.) The case required such a simple investigation, "that its hornbook preparation to have done this and it could have been done easily with very little expenditure of energy, and it should have been done promptly. And it just was not. Mr. Rucker could not understand how one could possibly represent someone in this type of case without having searched for witnesses to place the time of the homicide at a time when Petitioner was not there. (App. G 75.) It made no difference how otherwise excellent defense counsel's performance may have been; his failure to adequately investigate the alibi defense rendered his overall performance below professional norms. (App. G 82.)

Defense counsel's task was to drive to the scene, see what businesses were adjacent to the scene, contact those businesses to see when they were open, and request or subpoena, if necessary, their employee lists. There was no imaginable strategic reason for counsel to fail to take those steps. (App. G 75-76.) In fact, the magistrate judge remarked

that defense counsel had not made a reasoned decision not to subpoena the records of the adjoining businesses, he did not even think of it. (App. G 117-118.)

In Mr. Rucker's opinion, the investigation, if adequately pursued, would have led to Mr. Enyart whose business cleaned the automobile agencies. A subpoena would have borne fruit. Merely visiting the scene to see who is around on a routine basis is not as complete, it is more time consuming, and unnecessary. Defense counsel admitted that he had not subpoenaed the business records of the adjoining businesses. (App. G 72-73.)

In Mr. Rucker's opinion, defense counsel could not rest upon the efforts of his predecessor during the first trial. In fact, defense counsel learned that the alibi defense in the first trial had been weakened by the less than expected credibility of A.A. member Mr. Barbarino. This information put defense counsel on further notice that the alibi defense needed to be augmented with further support. (App. G 73-74.)

Mr. Rucker stated that just because the victim's money was not taken, one could not rule out robbery as a motive for the killing. It is not unheard of for a perpetrator to become frightened at the consequences of his actions and to flee without taking any property. (App. G 83.)

Mr. Barry Levin, another very experienced criminal trial attorney, provided a declaration (HC exh. AA) substantially echoing Mr. Rucker's opinion, but Mr. Levin was not called to testify at the December 6, 1999, hearing.

D. THE NINTH CIRCUIT TRIVIALIZED PETITIONER'S CLAIM AND FAILED TO FOLLOW PRECEDENT FROM ITS OWN CIRCUIT AS WELL AS THE PRECEDENT OF OTHER CIRCUITS IN INTERPRETING WHETHER THE STATE'S COURT APPLICATION OF *STRICKLAND* WAS REASONABLE

The Ninth Circuit Court of Appeal, in a mere three-paragraph assessment of the entirety of petitioner's claims, concluded "counsel certainly did quite enough under the circumstances to bring his actions within the broad range of conduct that we consider reasonable professional assistance." (App. C.) However, *Strickland v. Washington*, 466 U.S. 668 [80 L.Ed.2d 674, 104 S.Ct. 2052] (1984) means more than merely putting in an effort, even a substantial effort, if that effort is not reasonable under prevailing norms of practice. (*United States v. Mojica*, 984 F.2d 1426, 1452 (7th Cir. 1993) (quoting *Strickland*, 466 U.S. at pp. 687-691); *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997).) The American Bar Association, Standards for Criminal Justice, may inform what is reasonable under "prevailing norms of practice." (*United States v. Loughery*, 908 F.2d 1014, 1018 (D.C. Cir. 1990).) They are guides, but they should not distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. (*Strickland v. Washington, supra,* at p. 689.)

The ABA Standards instruct: "[I]ncluded in defense counsel's obligations to the client is the responsibility of furthering the defendant's interest to the fullest extent that the law and the applicable standards of professional conduct permit." (ABA Standards for Criminal Justice Prosecution Function and Defense Function, Third Addition (3rd ed.1993), § 4-1.2, p. 122 [hereinafter, ABA Standards].) A lawyer cannot be half-hearted in the application of his or her energies to a case. (*Id.* at pp. 122-123.) "Once a case has been undertaken, a lawyer is obliged not to omit any essential lawful and ethical step in the defense, without regard to

compensation or the nature of the appointment." (*Id.* at p. 123.) "Effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively." (*Id.* at p. 183.) "[W]ithout careful preparation, the lawyer cannot fulfill the advocate's role." (*Ibid.*) "Defense counsel should conduct a prompt investigation of the circumstances of the case and *explore all avenues* [emphasis added] leading to facts relevant to the merits of the case ...." (ABA Standards, *supra*, Standard 4-4.1 (a), Duty to Investigate at p. 181.)

The defense effort required must be equal to the task. The ABA Standards instruct:

> Considerable ingenuity may be required to locate persons who observed the criminal act charged or who have information concerning it. After they are located, their cooperation must be secured. It may be necessary to approach a witness several times to raise new questions stemming from facts learned from others. (ABA Standards, *supra*, Standard 4-4.1 (a), Duty to Investigate at p. 182.)

Prevailing norms of practice do not permit defense counsel to rely on law enforcement's investigation for flushing out defense issues (Bailey, Investigation and Preparation of Criminal Cases (2d ed. 1985) pp. 3, 642-643), particularly, as here, where no one in law enforcement personally spoke with each of the neighboring businesses' employees. The defense investigator should speak to everyone in the neighboring area that had a chance to observe (or hear) the events. (*Id.* at pp. 34, 642-643.)

"Interviewing of all witnesses is crucial because it may produce valuable information which may have been omitted in the original statements taken from a subjective standpoint." (Wells, *Validating The Credibility Of A Criminal Defense Witness,* (August 1966) The Legal Investigator, at p. 32.) "It is important to recognize that not all of the investigative agency's personnel with knowledge of the case will be included in the discovery provided by the state. Only witnesses who are helpful to the prosecution will be provided. These same witnesses may be of vital interest to the defense investigation to determine any potential inconsistencies from earlier statements and to assess the witnesses' capacity for recollection of events, and veracity in delivering an opinion of what transpired." (*Ibid.*) It is clear that these norms were not followed here.

A defense attorney must look into readily available sources of evidence. (*Hall v. Washington,* 106 F.3d 742, 749 (7th Cir. 1997).) When the issue is guilt, defense counsel's duty of investigation is fairly well defined; counsel must interview potential witnesses likely to provide material evidence favorable to the defense. (*Williams v. Washington*, 59 F.3d 673, 680-681 (7th Cir.1995); *United States v. Shetterly*, 971 F.2d 67, 74 (7th Cir.1992); *Sullivan v. Fairman*, 819 F.2d 1382, 1391-1392 (7th Cir.1987).

The right to counsel requires a reasoned judgment as to the amount of investigation the particular circumstances of a given case require. An attorney must have reasonable grounds for not investigating every potential avenue for a viable defense. (*Lewis v. Mazurkiewicz*, 915 F.2d 106, 114 (3d Cir. 1990); *Berryman v. Morton*, 100 F.3d 1089, 1101 (3d Cir. 1996).) "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (*Berryman v. Morton*,

supra, 100 F.3d at p. 1101 (quoting *Strickland*, 466 U.S. at pp. 690-691).)

The Ninth Circuit has repeatedly recognized that the unique circumstances of each case dictate the requisite avenues for a thorough defense investigation. (*See Phillips v. Woodward,* 267 F.3d 966, 976-977 (9th Cir. 2001) [failure to develop facts that would mitigate client's involvement in the shooting and thereby reduce the likelihood of the jury opting for the death penalty even where it would not have changed the outcome as to his guilt] *Schell v. Witek*, 181 F.3d 1094, 1103-1104 (9th Cir. 1999) [failure to consult a fingerprint expert constituted ineffective assistance of counsel where a single fingerprint tied him to the crime]; *Hart v. Gomez*, 174 F.3d 1067 (9th Cir. 1999) [failure to investigate and introduce evidence central to Petitioner's defense that corroborated defense witnesses]; *Jones v. Wood, supra,* 114 F.3d 1002 [failure to investigate third party culpability and test hairs found on victim's body where defendant had the opportunity but no motive for the homicide[6]]; *Baylor v. Estelle*, 94 F.3d 1321 (9th Cir. 1996) [failure to follow-up on a criminalist's report that semen sample taken might not have come from the defendant even where the defendant had confessed, although later recanted alleging the confession was coerced]; *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999) [failure to investigate evidence that victim was alive day after prosecution's theory for death]; *Brown v. Myers*,137 F.3d 1154 (9th Cir. 1998) [failure to investigate alibi claim and corroborate the defendant's testimony].)

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6 The words of the Court in *Jones v. Wood, supra,* 207 F.3d 557, provide close parallels to petitioner's case: "No one but the architect of this tragedy knows with absolute certainty who killed [the victim]. [Petitioner] has tendered a credible theory, based on admissible evidence, that someone else took [the victim's] life. He has shown that his attorney failed to investigate this theory before the murder trial. Thus, his original conviction cannot stand." (*Id.* at p. 564.)

An additional survey of cases involving a lack of reasonable investigation is found in *Sanders v. Ratelle,* 21 F.3d 1446, 1456-1457 (9th Cir. 1994).

> Although there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and "[j]udicial scrutiny of counsel's performance must be highly deferential," *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2055, counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. *Id.* at 691 ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Thus, we have found counsel to be ineffective where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so. *See Hendricks v. Vasquez,* 974 F.2d 1099, 1109 (9th Cir.1992) (vacating the judgment of the district court where it is not possible to "determine if counsel's decision was a strategic one, and, if so, whether the decision was a sufficiently informed one"); *U.S. v. Burrows*, 872 F.2d 915, 918 (9th Cir.1989) (holding counsel's conduct deficient where he failed to investigate a possibility of a mental illness defense and the "district court's assumptions that the attorney must have considered an insanity defense and might have rejected it for strategic reasons appear not to have been based on the record"); *Deutscher v. Whitley*, 884 F.2d 1152, 1160 (9th Cir.1989)

(holding that counsel did not make a strategic decision where the defense was based on petitioner's psychiatric problems, yet counsel failed to "even consider investigating evidence which would have bolstered that defense"), vacated on other grounds, 113 S.Ct. 367 (1992); *Evans v. Lewis,* 855 F.2d 631, 637 (9th Cir.1988) (holding that a failure to investigate a possibility of mental impairment "cannot be construed as a trial tactic" where he did not even bother to view relevant documents that were available).

Other Circuits agree that the failure to conduct a reasonable investigation constitutes deficient performance. The Third Circuit has held that "ineffectiveness is generally clear in the context of complete failure to investigate because counsel *can hardly be said to have made a strategic choice when s/he [sic] has not yet obtained the facts on which such a decision could be made.*" [Emphasis in orig.] See *U.S. v. Gray*, 878 F.2d 702, 711 (3d Cir.1989). A lawyer has a duty to "investigate what information ... potential eye-witnesses possess[ ], even if he later decides not to put them on the stand." *Id.* at 712. *See also Hoots v. Allsbrook*, 785 F.2d 1214, 1220 (4th Cir.1986) ("Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics."); *Birt v. Montgomery*, 709 F.2d 690, 701 (7th Cir.1983), cert. *denied*, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984) ("Essential to effective representation ... is the independent duty to investigate and prepare.").

(*Sanders v. Ratelle, supra,* 21 F.3d at pp. 1456-1457.)

Other Circuits provide further illustrations. The decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial. (*Henderson v. Sargent*, 926 F.2d 706, *amended*, 939 F.2d 586 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 915 (1992).) In *Henderson* the Court affirmed the grant of a writ of habeas corpus for failure of trial counsel to pursue the available theory that the killing was committed by someone other than petitioner. (*Ibid.*) Counsel has "a duty ... to investigate all witnesses who allegedly possessed knowledge concerning [the defendant's] guilt or innocence." (*Lawrence v. Armontrout*, 900 F.2d 127, 130 (8th Cir.1990); accord *Henderson v. Sargent, supra*, 926 F.2d at p. 711.) In *Foster v. Lockhart*, 9 F.3d 722 (8th Cir. 1993) the court affirmed the grant of a habeas writ where trial counsel failed to investigate that his client was impotent where the charge was rape. (*Ibid;* accord *Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001) [failure to produce expert testimony that would have established that hair found on the victim was not petitioner's].) In the Circuit for the District of Columbia, the Court in *United States v. DeCoster*, 487 F.2d 1197, 1203-1204 (D.C. Cir. 1973) observed:

> Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The

> investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research. [Footnotes omitted.] (*United States v. DeCoster*, 487 F.2d 1197, 1203-1204 (D.C. Cir. 1973), quoting *United States v. Ash*, 413 U.S. 300 [37 L.Ed.2d 619, 93 S.Ct. 2568].)

Failure to conduct a reasonable investigation constitutes deficient performance. (See *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997); see also, *Tennessee v. Burns*, 6 S.W.3d 453, 460-463 (Tenn. 1999) [ineffective assistance of counsel for failure to investigate that an alternate suspect or suspects had committed the crimes particularly where the defense had only to raise a reasonable doubt as to the defendant's guilt and the prosecution's corroborating evidence was scant]; *Owens v. Dormire*, 198 F.3d 679, 682 (8th Cir. 1999) [failure to read a co-defendant's trial transcripts may constitute deficient performance under *Strickland*].)

In *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000) the Court addressed trial counsel's failure to timely subpoena an alibi witness or seek the assistance of an investigator to locate the witness, although the attorney made three attempts to find her. (*Id.* at p. 623, 625, 629.) Trial counsel had been too busy with other matters and apparently gave no thought to the potential benefits of an investigation. (*Id.* at p. 631.) The Seventh Circuit concluded that this was not a reasonable tactic and found the state court's resolution of the issue an unreasonable application of clearly established Federal law. (*Id.* at pp. 629-632.)

Yet, the Ninth Circuit Court's decision ignores the obvious parallels between petitioner's case and the above cited authority of the Ninth Circuit and numerous other reviewing courts that the unique circumstances of each case

dictate the requisite avenues for a defense investigation to satisfy the vigorous advocacy of the defendant's cause required by *Strickland.* (*Strickland v. Washington, supra,* at p. 689.) In the instant case, trial counsel was burdened by a substantial caseload of clients facing the most serious of offenses and with inadequate investigative resources. Trial counsel gave no thought to the potential benefits of investigating for witnesses at the automobile agency west of the scene of the homicide or for obtaining the names of all the employees at the adjoining businesses that were on duty on the night of the homicide, even though their identity could have been so efficiently and inexpensively obtained by the mere issuance of a subpoena. Counsel did not even interview the operator of the cleaning crew or his staff that had been on duty at the adjoining dealerships on the night of the homicide, even though he had been identified in the discovery counsel had been provided.

The criminal defendant's right to effective assistance of counsel may, in a particular case, be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial (*Murray v. Carrier*, 477 U.S. 478, 496 [91 L.Ed.2d 397, 106 S.Ct. 2639] (1986)), as it clearly was here. The attorney's unreasonable performance must be deemed to have rendered the trial unreliable or the proceedings unfair (*Lockhart v. Fretwell*, 506 U.S. 364 [122 L.Ed.2d 180, 113 S.Ct. 838] (1993)), again, a standard clearly met here. Taking all of the proceedings into account, counsel failed to make "the adversarial testing process work" thereby depriving petitioner of his Sixth Amendment rights. (*Holman v. Gilmore*, 126 F.3d 876, 882 (7th Cir. 1997) (quoting *Strickland* 466 U.S. at p. 690).)

Petitioner's entire trial was focused on resolving when the fatal shots were fired. The value to the defense of being able to establish that they were fired when petitioner's alibi irrefutably established that he was 65 miles from the crime

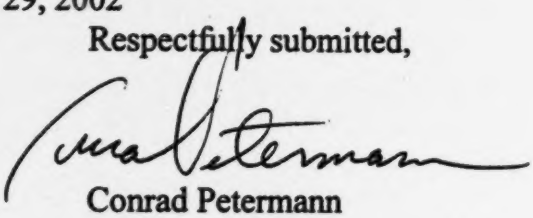
scene is manifest. (See, e.g., *Lee v. Kemna*, ___ U.S. ___ [2002 U.S. Lexis 494] (2002) ["Given the repeated references to the anticipated alibi witness testimony each day of trial, it is inconceivable that anyone in the courtroom harbored a doubt about what the witnesses had traveled from California to Missouri to say on the stand or why their testimony was material, indeed indispensable, to the defense"].) The Ninth Circuit trivialized petitioner's claims, ignored the precedent from its own court as well as that from other circuits as provided in petitioner's briefs, and failed to meaningfully review the district court's and the state court's findings on petitioner's Sixth Amendment claim.

CONCLUSION

As the above authority manifests, this is an issue of frequently recurring interest in state and federal courts with particular poignancy in the context of an innocent man spending the rest of his life in prison simply because his trial counsel failed to adequately investigate his defense. It is respectfully submitted, that the Court should grant certiorari to determine whether as a matter of law "appropriate" and "reasonable" investigations are determined by the characteristics of each case or, alternatively, to exercise this Court's supervisory power and summarily reverse the Ninth Circuit's decision with directions that the Court fully address petitioner's claims and cited authority.

Dated: January 29, 2002

Respectfully submitted,



Conrad Petermann
Attorney for Petitioner

APPENDIX A

A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-APPEALS

Case No ED CV-98-00215-VAP (E)

Date November 21, 2001

Court of Appeals # 00-56505

Title ALAN RICHARD MYERS –v- CA TERHUNE, Director, et al

PRESENT HONORABLE VIRGINIA A PHILLIPS, US DISTRICT JUDGE

Rachel Ingram — Courtroom Deputy

None Present — Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS

None Present

ATTORNEYS PRESENT FOR DEFENDANTS

None Present

PROCEEDINGS: FILING AND SPREADING MANDATE OF THE NINTH CIRCUIT COURT OF APPEALS

__IN COURT X_IN CHAMBERS (No hearing necessary

X_COUNSEL NOTIFIED

The Court ORDERS that the mandate of the Ninth Circuit Court of Appeals

X_Affirming __Remanding __Reversing and Remanding

__Affirming in part, reversing in part

__Dismissing Appeal __Other

is hereby filed and spread upon the minutes of this District Court

ENTERED ON NOV 27, 2001

Initials of Deputy Clerk (s)

MINUTES FORM 48

APPENDIX B

B

NOT FOR PUBLICATION

FILED

NOV -6 2001

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALAN RICHARD MYERS Petitioner-Appellant, v. C.A. TERHUNE, Director; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees	No. 00-56505 D.C. No. CV-98-00215-VAP (E) ORDER DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before: FERNANDEZ, KLEINFELD, and McKEOWN, Circuit Judges

The panel has unanimously voted to deny the appellant's petition for rehearing. The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing and the petition for rehearing en banc are DENIED

APPENDIX C

NOT FOR PUBLICATION

FILED
SEP 25 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALAN RICHARD MYERS Petitioner-Appellant, v. C.A. TERHUNE, Director; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees	No. 00-56505 D.C. No. CV-98- 00215-VAP (E) **MEMORANDUM***

Appeal from the United States District Court
For the Central District of California
Virginia A. Phillips, Magistrate Judge, Presiding

Submitted September 12, 2001**
Pasadena, California

Before: FERNANDEZ, KLEINFELD, and McKEOWN, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

California State prisoner Alan Richard Myers appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition, which challenged his first degree murder conviction. We affirm.

Myers claims that his trial attorney did not perform a sufficient investigation and thereby deprived him of his right to the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). The state courts found to the contrary, but Myers contends that we should still grant relief because they applied the law improperly. See 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 401-09, 120 S.Ct. 1495, 1518-21, 146 L.Ed. 2d 389 (2000); Nguyen v. Lindsey, 232 F. 3d 1236, 1239-40 (9th Cir. 2000). We have reviewed the record and we disagree.

As the state courts and the district court decided, counsel certainly did quite enough under the circumstances to bring his actions within the broad range of conduct that we consider reasonable professional assistance. Strickland, 466 U.S. at 690, 104 S. Ct at 2065. Myers' suggestion that counsel could have done more does not change that; a claim of that kind can almost always be made. See Babbit v. Calderon, 151 F.3d 1170, 1173-74 (9th Cir. 1998). What Myers' attack amounts to is a request that we use the distorting hindsight that the Supreme Court has warned us against. See Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; Smith v. Stewart, 140 F. 3d 1263, 1268 (9th Cir. 1998); Siripongs v. Calderon, 35 F. 3d 1308, 1323 (9th Cir. 1994) (Fernandez, J., dissenting).

AFFIRMED.[1]

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1 We decline to address other issues raised by Myers, which are not within the certificate of appealability granted by the district court. See

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United States v. Zuno-Arce, 209 F.3d 1095, 1103 (9th Cir. 2000); Hiivala v. Wood, 195 F.3d 1098, 1102-03 (9th Cir. 1999).

APPENDIX D

FILED
CLERK U.S. DISTRICT COURT
JUL 25 2000
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY
ENTERED
CLERK U.S. DISTRICT COURT
JUL 28 2000
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

LODGED
CLERK U.S. DISTRICT COURT
JUN 28 2000
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALAN RICHARD MYERS
Petitioner-Appellant,

v.

C.A. TERHUNE, Director;
ATTORNEY GENERAL OF
THE STATE OF
CALIFORNIA,
Respondents-Appellees

No. ED CV-98-00215-VAP (E)

JUDGMENT

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

Pursuant to the Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED: July 25, 2000.

/s/ Virginia A. Phillips
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

APPENDIX E

FILED
CLERK U.S. DISTRICT COURT
JUL 25 2000
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY
ENTERED
CLERK U.S. DISTRICT COURT
JUL 28 2000
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

LODGED
CLERK U.S. DISTRICT COURT
JUN 28 2000
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALAN RICHARD MYERS
Petitioner-Appellant,

v.

C.A. TERHUNE, Director; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents-Appellees

No. ED CV-98-00215-VAP (E)

ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

IT IS ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on Petitioner and counsel for Respondent.

LET JUDMENT BE ENTERED ACCORDINGLY.

DATED: July 25, 2000.

/s/ Virginia A. Phillips
VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

APPENDIX F

FILED
CLERK, U.S. DISTRICT COURT
JUN 28 2000
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALAN RICHARD MYERS Petitioner, v. C.A. TERHUNE, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, Respondents.	No. ED CV-98-00215-VAP (E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Virginia A. Phillips, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

On September 4, 1998, Petitioner filed a "Petition for Writ of Habeas Corpus by a Person in State Custody," a "Petition for Writ of Habeas Corpus and Memorandum and Points and Authorities in Support of the Petition by a Person in State Custody," and "Exhibits Accompanying Petition for Writ of Habeas Corpus, etc." Respondent filed an Answer on October 5, 1998. Petitioner filed a Traverse on October 19, 1998.

On December 17, 1998, Petitioner elected to abandon "Ground Two" of the Petition. This abandonment leaves as Petitioner's sole claim a claim of ineffective assistance of counsel. See December 17, 1998 Minute Order.[1]

Petitioner filed a "Trial Brief on March 8, 1999, "First Supplemental Exhibits, etc.," on March 16, 1999, and a "First Amended Trial Brief" on November 1, 1999. Respondent filed a "Hearing Brief" on November 15, 1999.

The Magistrate Judge conducted an evidentiary hearing on December 6, 1999. The Magistrate Judge received the transcript of the evidentiary hearing on December 30, 1999.

BACKGROUND

On December 8, 1992, just before midnight, the body of Michael ("Norris") was found lying in parking lot behind his motorcycle shop in Norco (Reporter's Transcript ("R.T.") 89-91, 99, 116-17, 191-92). Norris fatally had been shot once in the back of the head (R.T. 318–31, 1089–91). Credit cards and keys were found on his person (R.T. 101–102, 137, 367–68).

Norris and Petitioner's wife had been having an affair (R.T. 572, 1271). Petitioner learned of this affair and told a friend that Petitioner wanted to confront Norris (R.T. 886-87, 891–92, 1246, 1481–83, 1580–81, 1997–2004, 2014–15). Norris and Petitioner's wife spent the night together on December 5, 1992 (R.T. 601, 605–606). Petitioner placed several telephone calls to Norris' residence on December 7, 1992, the day before the murder (R.T. 2045–47). Petitioner, a

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[1] Petitioner subsequently sought to leave to amend the Petition to reintroduce the previously abandoned Ground Two. The Magistrate Judge denied the leave by "Memorandum and Order," filed June 23, 1999. For the reasons stated in this Memorandum and Order, and notwithstanding Petitioner's "Objections, etc.," filed July 6, 1999, this Court should not permit Petitioner to reintroduce the previously abandoned Ground Two.

closet alcoholic, previously had exhibited jealous behavior concerning his wife (R.T. 507-16, 549, 895, 1485-86, 1522, 1542-47, 1586-87, 2034).

Petitioner could not corroborate his whereabouts for the time period immediately preceding approximately 8:55 p.m. on December 8, 1992. Petitioner asserted he earlier had placed a call from a particular public telephone far from the scene of the crime, but records from that telephone tended to refute this assertion (R.T. 2244-45, 2247-48, 2253-54). Petitioner denied ever visiting Norris' motorcycle shop, but a shop employee testified Petitioner had done so (R.T. 1189-90, 1192, 1222-23, 1521-22, 2084). There existed some evidence Petitioner was present at the scene of the crime in the early evening of December 8, 1992 (R.T. 641, 1030-33, 1076-80, 1100-24, 1166, 1222-23, 1491-92, 1496, 1522, 1568-74, 1589-90, 1800-1801, 1807, 1858-59, 2049-50). There also existed evidence Petitioner had lied about how Petitioner knew Norris' motorcycle shop was in Nuevo (R.T. 1588, 2224-25).

Petitioner owned a gun of a type that could have delivered the fatal bullet (R.T. 1326-27, 1343, 2019). During the investigation of Norris' shooting and before Petitioner's arrest, Petitioner told police the serial number of this gun (R.T. 1472-73). When the police asked Petitioner to bring this gun to the police station, Petitioner initially agreed, but later called and canceled the appointment (R.T. 1497-99). Then, when the police went to the Petitioner's residence that same evening, Petitioner said that he could not find the gun and that Petitioner last had seen the gun months earlier (R.T. 919-20, 1500-1507). Petitioner claimed he had provided the police with the serial number, not from the gun itself, but from a piece of paper he had kept in his wallet (R.T. 1606-1607). The police asked for this piece of paper, but Petitioner claimed to have thrown the paper away sometime subsequent to the police's initial inquiry (R.T. 1607).

Norris was alive at 7:50 p.m., on December 8, 1992 (R.T. 1255-64). Medical evidence could not pinpoint with certainty the time of his death (R.T. 335-42, 1097-98, 1894-1911). Death probably occurred between 8:00 p.m. and midnight, according to medical evidence (R.T 1098, 1894-1911). The prosecution theorized the shooting took place prior to 9:00 p.m., during the time for which Petitioner had no confirmable alibi (See, e.g., R.T. 2351-52).

Immediately after the murder, the police contacted businesses surrounding the motorcycle shop and eventually interviewed over 100 witnesses (R.T. 147, 154, 1655-57, 2519-20, 2520, 2535-36, 2538, 2581-82). The police did not locate anyone who said he or she had heard a shot on the night in question (R.T. 1657, 2520). Not even a security company employee, stationed only about 70 feet from where the shooting occurred, heard any shot that night (R.T. 442-47, 1657, 2533). Among the interviewed witnesses who denied having heard anything unusual on the night in question was Raymond Scott Enyart ("Enyart") (R.T. 2521-22, 2534-35).

Petitioner's trial attorneys and their investigators also did not locate any earshot witness. Following his July, 1994 appointment, Petitioner's second attorney, John Isaacs ("Isaacs"),[2] visited the crime scene at least 20 to 25 times (R.T. 2573). On three separate occasions, Isaacs' investigator also visited the scene. Id. Isaacs talked to people at the business complex at the crime scene and inquired whether there were any percipient witnesses to the shooting (R.T. 2573, 2566). Isaacs recontacted the majority of the witnesses contacted during the police investigation, but did not recontact Enyart (R.T. 2566-67) On two or three occasions, Isaacs visited the Frahm Chrysler agency, a business located

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[2] Petitioner's first trial ended in a hung jury (Clerk's Transcript ("C.T.") 81). Isaacs represented Petitioner at his second trial.

north of the crime scene (R.T. 2567). Isaacs talked to some of the employees there. Id. Isaacs did not visit the Phillips Mazda agency across the street, west of the crime scene (R.T. 2567-2571). Isaacs talked to a number of people on the street during his numerous visits to the area, but did not inquire where these persons were employed (R.T. 2568).

In January of 1995, the jury found Petitioner guilty of first degree murder (R.T. 2419-20, 2431, 2433-38). In April of 1995, Petitioner filed a motion for a new trial (C.T. 253). This motion argued, inter alia, ineffective assistance of counsel for failure to locate an present at trial potential witness Enyart (C.T. 300-302).

The trial judge conducted a post-trial evidentiary hearing in June, 1995. At this evidentiary hearing, Enyart testified that, in December of 1992, he performed janitorial services for automobile dealerships in Norco, including Frahm Chrysler (R.T. 2489-90). Enyart stated that, some evening in December, 1992, he heard two gunshots at approximately 9:30 p.m. (R.T. 2490-91). He was standing in the parking lot at the Frahm dealership at the time he heard the shots (R.T. 2491). Although, at one point, Enyart stated he believed he approached uniformed officers the same night he heard the shots, Enyart later admitted he was not sure of the particular night he heard the shots (R.T. 2492-93, 2499-2500, 2503-04; see also C.T. 368). Although interviewed by police in connection with the matter, Enyart never told police he heard any shots (R.T. 2521-22, 2534-35, 2500).

Another potential witness, Michael Ramos ("Ramos"), also testified at the June, 1995 evidentiary hearing (R.T. 2469-87). Ramos testified that, in December of 1992, he worked for Phillips Mazda (R.T. 2471). Phillips Mazda was located across the street, west of the crime scene (R.T. 2471-

72). Ramos testified that, on one particular December night,[3] although his shift ended at 9:00 p.m., he remained at his place of work beyond the time (R.T. 2471-73). At 9:20 or 9:25 p.m., while leaning against a wall, Ramos reportedly heard two shots (R.T. 2472-73, 2479). Ramos then was near an operating water fountain and under and outdoor speaker that was playing soft music (Id.) Ramos then was about 200-300 yards away from the rear of the motorcycle shop (R.T. 2481). Ramos thought the shots came not from the area of the motorcycle shop but from the area of the 7-Eleven, a quarter mile south of his location (R.T. 2475, 2478, 2481). Although Ramos claimed he a associated his hearing these gunshots with his subsequent knowledge that someone had been killed, he chose not to come forward because he "didn't want to get involved" (R.T. 2483).

The trial court denied the motion for a new trial, rejecting the suggestion that Isaacs (or his predecessor) provided ineffective assistance of counsel (R.T. 2619-24; see also R.T. 2561-62). The California Court of Appeal likewise found that Petitioner's trial counsel was not ineffective in failing to subpoena the employment records of neighboring businesses to locate possible witnesses (Exhibit S to "Exhibits Accompanying Petition, etc.," filed September 4, 1998 ("Ct. App Op.") at 23-25). The Court of Appeal stated:

> "Both defendant's first attorney and [Isaacs] were aware of the police investigation of the case. That investigation included many contacts with persons employed at the surrounding businesses. That investigation also took place well before suspicion focused on [Petitioner] . . .

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3 Ramos was uncertain of the date, though he said the date preceded by one day his having heard a rumor "somebody had gotten killed" "across the street" (R.T. 2472)

> "In addition, although employees at the auto dealerships were well aware of the killing, not a single person ever came forward with any information. The defense posted reward posters in the area, asking for witnesses, but produced no leads.
>
> "Given these facts, we cannot fault defense counsel's performance in failing to pursue further avenues that had so far proved fruitless. As with any investigation, there is always something else that might have been done, but we are not entitled to judge with hindsight. [Petitioner] has failed to show his counsel's performance was deficient. His claim of ineffective assistance of counsel fails" (Ct. App. Op. at 24-25).

With specific regard to Enyart, the Court of Appeal found:

> "The police investigation included a specifically mentioned contact with Enyart. He told police he heard no gunshots. Even at the date of the new trial motion, Enyart admitted he might have told the officer that. Thus, even if the defense had discovered and interviewed Enyart much closer to the time of the killing, it is unlikely that any information would have been developed" (Ct. App. Op. at 24).

Following the denial of California Supreme Court review, Petitioner renewed his ineffective assistance of counsel claim in the present proceeding. At the December 6, 1999, evidentiary hearing before the Magistrate Judge, Enyart testified he could not connect the night when he heard shots and the night when he saw police activity (Reporter's Transcript of Proceedings, December 6, 1999 ("Fed. R.T.") 29-30) Enyart also testified he heard the shots "very soon"

after his 9:00 p.m. arrival at work (Fed . R.T. 31). Ramos did not testify at the evidentiary hearing; Petitioner's investigator could not re-locate Ramos (Fed. R.T. 48-49). Edward A. Rucker ("Rucker"), a criminal defense attorney, testified as Petitioner's expert witness. Rucker opined Isaacs' investigation had been unreasonably deficient (Fed. R.T. 67-68).

STANDARD OF REVIEW

The Petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, signed by the President on April 24, 1996 ("AEDPA"). Therefore, AEDPA's provisions apply. See Lindh v. Murphy, 521 U.S. 320, 336-37 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir.) (en banc), cert. Denied, 522 U.S. 1008 (1997). AEDPA provides, in relevant part, that an application for writ of habeas corpus on behalf of a person in state custody shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) resulted in decision that was contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the Untied States"; or (2) resulted in a decision that was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d) (as amended); see Williams v. Taylor, 120 S. Ct. 1495 (2000); Weighall v. Middle, 2000 WL 702986 (9th Cir. June 1, 2000); Van Tran v. Lindsey, 2000 WL 622070 (9th Cir. May 16, 2000).

DISCUSSION

For the reasons discussed herein, the Petition should be denied and dismissed with prejudice.

I. Federal Law Governing Ineffective Assistance of Counsel Claims

To establish ineffective assistance of counsel, Petitioner must prove: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 688, 694,697 (1984) ("Strickland"). The court may reject the claim upon finding either that counsel's performance was reasonable or the claimed error was not prejudicial. Strickland, 466 U.S. at 697; Williams v. Calderon, 52 F.3d 1465, 1470 n.3 (9th Cir. 1995), cert.denied, 516 U.S. 1124 (1996).

Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. United States v. Quintero-Barraza, 78 F.3d 1344, 1348 (9th Cir. 1995), cert. denied, 519 U.S. 848 (1996); see Strickland, 466 U.S. at 689 ("a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"). The Court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. The test is "only whether some reasonable lawyer . . . could have acted, in the circumstances, as defense counsel acted." Coleman v. Calderon, 150 F.3d 1105, 1113 (9th Cir.), rev'd on other grounds, 525 U.S. 141 (1998), cert. denied, 425 U.S. 1058 (1998) (citations and internal quotations omitted). The Court may "neither second-guess counsel's decisions, not apply the fabled twenty-twenty vision of hindsight."

Campbell v. Wood, 18 F.3d 662, 673 (9th Cir.), cert. denied, 511 U.S. 1119 (1994).

II. Petitioner Has Not Carried His Burden of Proving Counsel's Investigation was Unreasonable.

Petitioner has failed to demonstrate that trial counsel's investigatory acts or omissions fell outside "the wide range of reasonable professional assistance." Petitioner's contrary arguments should be rejected.

The police conducted a prompt and extensive investigation, which included contacts with businesses surrounding the murder scene. This investigation did not yield any earshot witness. Police interviewed the person apparently closet to the shooting. This person said she heard nothing.

Nevertheless, and despite the passage of more than a year and a half between the shooting and his appointment, Isaacs did conduct significant investigation. He personally visited the scene many times, talked to numerous people and he also utilized an investigator. He recontacted the majority of witnesses contacted during the police investigation. Although the record does not disclose the degree to which Isaacs' investigation was systematic or comprehensive, Isaacs' investigatory efforts were extensive.

A police interview of Enyart, conducted soon after the shooting, did not reveal any material evidence. Neither Isaacs' failure to re-interview Enyart nor his failure to obtain employee records from surrounding businesses was unreasonable under the circumstances. See In re Cudjo, 20 Cal. 4th 673, 694, 85 Cal. Rptr. 2d 436, 449, 977 P.2d 66, 79 (1999) ("there is no fixed rule requiring counsel to confirm all key facts stated in law enforcement investigation reports . . . Absent some concrete reason to doubt the reliability of this information . . . trial counsel could reasonably accept it as accurate"); cf. Strickland, 466 U.S. at 691 (when counsel is given reason to believe that pursuing certain investigations

would be fruitless, counsel's failure to pursue those investigations may not be later challenged as unreasonable); McDonald v. Delo, 897 F. Supp 1224, 1251 (E.D. Mo. 1995), aff'd 101 F.3d 588 (8th Cir. 1996), cert. denied, 521 U.S. 1127 (1997) (where counsel reasonably could infer there existed no additional witnesses with percipient knowledge, counsel not ineffective for failing to investigate potential witnesses across the street from the scene of the crime).

This Court does not find Rucker's contrary opinion persuasive. Rucker did not review Isaacs' file to determine what was and was not done by Isaacs or at Isaacs' direction (Fed. R.T. 81-82). Rucker erroneously believed Isaacs had not utilized an investigator (Fed. R.T. 74). More fundamentally, Rucker seemed to contend that, regardless of the nature of the police investigation, regardless of the passage of time, and regardless of other investigatory measures undertaken by trial counsel, in necessarily would have been unreasonable for counsel to fail to obtain employee records for all businesses in the vicinity and to interview individually all employees listed on those records. Petitioner has not cited, and this Court has not found, any decisional authority that would extend counsel's duty under Strickland nearly so far. Cf. Blair-Bey v. Nix, 44 F.3d 711, 713 (8th Cir. 1995) ("We decline to impose a duty on criminal defense attorneys to hire private investigators to locate recalcitrant witnesses").

As the above discussion indicates, this Court finds Petitioner has failed to carry his burden of demonstrating counsel's unreasonableness. Thus, this court necessarily finds that the state courts similar determinations did not result "in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding."

28 U.S.C § 2254 (d); see Van Tran v. Lindsey, 2000 WL 622070 **6-7 (9th Cir. May 16, 2000) (state court decision must constitute "clear error" to warrant habeas relief under the AEDPA).[4]

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: June 28, 2000

/s/ Charles F. Eick
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeal, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

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[4] This Court need not and does not reach the issue of whether there exists a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

(10 COPIES OF THE
REPORTER'S TRANSCRIPT LODGED WITH COURT)

APPENDIX G

APPENDIX II

H-1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALAN RICHARD MYERS,
Petitioner

v.

C. A. TERHUNE, Director, California Department of Corrections, Respondent

No. EDCV 98-215 RT (E)

DECLARATION OF BARRY LEVIN

1. I am an attorney at law and licensed to practice in the State of California. My office is located at 11640 San Vicente Boulevard, Suite 201, Los Angeles, California. My telephone number is 310-208-6070. My four-page resume is attached hereto and incorporated herein as though fully set forth. I have tried to a jury 7 death penalty cases with no death judgments and I have represented additionally a similar number of clients in cases in which one form or another of homicide was charged. I am familiar with the standard of diligence required for a criminal trial attorney in this state at the time of Mr. Myers' trial, 1994.

2. I have been asked by Conrad Petermann, Mr. Myers' attorney, to access the representation Mr. Myers received from his trial attorney, Deputy Public Defender John Isaacs, in Mr. Myers' 1994 murder trial. To accomplish this task, I have reviewed an extensive amount of material that I have been provided. I have read, reviewed, and used as a basis for my professional opinion, the following

material: (1) three computer disks containing an unedited version of the reporters' transcripts of Mr. Myers' second trial; (2) a 48 page summary of the above transcripts; (3) the reporter's transcript of closing arguments; (4) the reporter's transcript of the hearings on the motion for new trial; (5) the petition for writ of habeas corpus form for federal court, as amended; (6) the petition for writ of habeas corpus and memorandum of points and authorities, as amended; (7) all the exhibits that accompanied the federal habeas petition; (8) respondent's notice of lodgment; (9) respondent's return; and (9) Mr. Myers' traverse.

3. It is my professional opinion that the representation by Mr. Isaacs in Mr. Myers' trial, fell well below the level of professional competence constitutionally required of an attorney in a murder case under the professional standards prevailing in 1994 as required by the Sixth Amendment to the Constitution. In reaching this conclusion, I have in mind the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 688 (1984). The *Strickland* standards posit two requirements. First, counsel's representation must fall below an objective standard of reasonableness under professional norms prevailing at the time of counsel's conduct. Second, a reasonable probability must exist that, but for counsel's deficient performance, the result of the proceedings would have been different.

4. Trial counsel committed serious errors and omissions in the investigation of and preparation for Mr. Myers' trial which individually and collectively amount to constitutionally ineffective assistance of counsel:

A. Trial counsel unreasonably failed to investigate and present readily available exculpatory evidence;

B. Trial counsel unreasonably failed to investigate for witnesses at the automobile agency

to the west of the crime scene to the sound of, or the lack of the sound of, shots from a firearm on the night of the homicide;

C. Trial counsel unreasonably failed to investigate for witnesses employed as janitors in the cleaning of the automobile agencies located to the north and west of the crime scene to the sound of, or the lack of the sound of, shots from a firearm on the night of the homicide; and

D. Trial counsel unreasonably failed to investigate through the use of a subpena for the employment records of the automobile agencies to the north and west of the crime scene and the janitorial service used by those agencies for witnesses employed by these employers that may have be witnesses to the sound of, or the lack of the sound of, shots from a firearm on the night of the homicide.

THE OBJECTIVE STANDARD OF REASONABLENESS UNDER PROFESSIONAL NORMS PREVAILING AT THE TIME OF COUNSEL'S CONDUCT

5. Every murder case requires thorough representation. Representation of an accused murderer in itself is a mammoth responsibility (*In re Hall* 30 Cal.3d 408,434, 179 Cal.Rptr. 223 (1980)) and the seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance (*In re Jones*, 13 Cal.4th 52, 59, 54 Cal.Rptr.2d 52 (1996)).

6. The demands for investigation are substantial. A lawyer cannot be half-hearted in the application of his or her energies to a case. Once a case has been undertaken, a lawyer is obliged not to omit any essential lawful and ethical step in the defense, without regard to compensation or the nature of the appointment. Consequently, without a thorough factual investigation, defense counsel

incapacitates himself from performing his constitutionally required role. Without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial, or moreover to challenge the heart of the prosecution's theory of the case. Effective representation in a constitutional sense reflects adversarial testing of the prosecution's case. Also, counsel must make informed tactical decisions on the nature and scope of the defense investigation in an attempt to uncover exculpatory evidence.

7. The demands of investigation require that counsel see to it that the facts surrounding the events of and witnesses to the crime are investigated. This investigation should be prompt and should explore all avenues leading to facts relevant to the merits of the case. The investigation literally must take counsel, usually vicariously through investigators, to every significant geographic and personal contact that may have pertinent evidence that may exonerate his client. An attorney is only excused from such pursuit if he has reasonable grounds for not doing so.

8. It is only after counsel has performed such an investigation that he can make a reasoned decision to pursue certain defense strategies and abandon others. Adequate pretrial preparation and investigation therefore safeguards a defendant's right to a fair trial and ensures the reliability of the adversarial testing process.

9. All individuals related to the commission of the crime obviously must be interviewed and the state's theory of prosecution must be questioned and challenged, if possible, either legally or factually. Usually, the investigator should be an experienced criminal investigator, familiar with crime scene evidence, court procedure, police investigative techniques, and prosecutorial strategy. This investigation journey is cumulative; the more you learn, the more you find out what you don't know and what you need to know.

The gems of the investigation are often found in the most unlikely places and can only be ascertained if the investigation is thorough and focused.

10. It is my professional opinion that well before the time trial counsel became involved in this case in 1994, there was an abundance of educational and other resource material establishing a high standard of care for the defense of murder cases in California. The minimal aspects of this high standard of care were promulgated in the 1993 Third Addition of the ABA Standards for Criminal Justice Prosecution Function and Defense Function, and it is, therefore, appropriate to judge counsel's conduct in this case by these Guidelines.

COUNSEL'S OMISSIONS FELL FAR BELOW THE STANDARD OF CARE FOR THE DEFENSE OF A MURDER CASE IN CALIFORNIA IN 1994 AND IT IS REASONABLY PROBABLE THAT BUT FOR COUNSEL'S DEFICIENT PERFORMANCE, THE RESULT OF MR. MYERS' TRIAL WOULD HAVE BEEN DIFFERENT

11. Based on my review of the material detailed above, I am of the strong opinion that trial counsel's investigation in this case was woefully inadequate, because it did not in any respect measure up to the minimal standard of care set forth above.

12. This was purely a circumstantial evidence case. There were no eyewitnesses to the shooting, no vehicle license plates had been identified at or leaving the scene of the crime, no physical evidence was discovered at the crime that directly indicated Mr. Myers was responsible, no physical evidence found with Mr. Myers that connected him to the crime, no fingerprints were found, and there was no confession.

13. The outcome of the trial was directly linked to the deductions and presumptions that would be made on the circumstantial evidence. Circumstantial evidence cases of

this nature are difficult to prosecute. If this had been a crime other than homicide, it is highly unlikely that it would have been prosecuted.

14. The general approach to the case formulated by trial counsel can be described as an alibi defense. It required (1) fixing the time of the shooting, if you could, and (2) establishing where Mr. Myers was at that time. Plainly stated, based on the prosecutor's theory, did Mr. Myers have the opportunity to commit the crime. There was plenty within the discovery materials provided the defense that indicated that there were people present in the area when the victim could have been shot. Where the crime is committed with a firearm, it is fundamental to determine who heard or did not hear the gunshot or gunshots at the time of the shooting. The first step was to determine who was in the area, including the automobile agencies and other businesses that surround the crime scene to the north and west. The second step was to confirm by subpoenaing business records of those businesses that everyone who was on duty that night had been interviewed. If this was done promptly, not only would Mr. Enyart and Mr. Ramos have been found, but other witnesses as well since both had either been with someone else when they heard the shots or had discussed hearing the shots with someone else.

15. If the steps in the preceding paragraph did not bear fruit, or did not bear adequate fruit, more exhaustive steps should have been employed to locate potential witnesses to the sound of or the absence of the sound of gunshot(s), e.g., a search for automated video recorders in adjoining business, subpena of traffic citations or accident reports occurring near the crime scene and during the four hour window in which the victim could have been shot.

16. The attorney in this type of case must zealously investigate for direct evidence to the crime. There may not be eyewitnesses, but where the crime was committed with a firearm, there should be witnesses to the sound of a gunshot

or witnesses that were positioned so that they should have heard a gunshot at a particular time if a gunshot had been fired. For defense counsel to fail to exhaustively investigate for such witnesses was incompetent.

17. The last person to have spoken with the victim did so by telephone at 7:50 p.m. Mr. Barbarino, a member of the Alcoholics Anonymous chapter that Mr. Myers attended, testified that he talked to Mr. Myers at an A.A. meeting on the night of the homicide, and their conversation may have been as late as 9:30 p.m. when the meeting ended. Unrefuted telephone records introduced at the trial established that a telephone call to Mr. Myers' estranged wife's residence was made at 9:50 p.m. from the Borque's residence where Mr. Myers was staying. The Borques testified that Mr. Myers was at their residence at about the time when the call was made. The Borques were entertaining guests following the funeral of Mr. Borque's father. The A.A. meeting hall was a 55-minute drive from the crime scene (61.4 miles) and the Borque's residence was a 10-minute drive from the A.A. meeting hall (.3 miles). The victim's body was found just before midnight.

18. In my professional opinion, it was essential for trial counsel to resolve whom, if anyone, was outside and within earshot to the sound of a gunshot from 7:50 p.m. until midnight. The likelihood of finding such person or persons was great since the business adjoining on the north and west were automobile dealerships with large open lots. Whether a person so situated heard or did not hear a gunshot would have been highly relevant to the viability of Mr. Myers' defense. With or without the aid of an investigator, such an investigation was very straightforward and relatively easy. With businesses in close proximity to the north and west of the crime scene, each of these businesses had to be combed for such witnesses. That investigation should also have disclosed that a private contractor after 9:00 p.m. did the cleaning for these

agencies. Indeed, the police investigation disclosed and identified Mr. Enyart as that contractor. The only way to help insure that all the employees of these businesses had been contacted was to subpena their employment records.

19. In these cases, it is never reasonable to rely solely on police investigation to locate potential defense witnesses. Law enforcement's goals in these cases are not synonymous with the defense's goals. Once the police have posited a suspect, their efforts are generally directed toward finding evidence that supports their premise and not towards evidence that disproves it. Once they have completed this process, they are not going to go back and look for evidence that will disprove their conclusions. This is not out of improper motives, but is the natural response of often working under time pressures and without adequate resources in the resolution of too many cases. This is not a matter of trying to put a case on someone, it is a question of the officer believing that he has the right person and not wasting his limited resources to try to disprove it. This is with the assumption that the officer is operating in good faith and ethically. Furthermore, one does not know what questions an officer asked and what the attitude of the witness was. Either could be determinative of the information obtained.

20. It is not reasonable to rely on an employer to investigate for employees that may be witnesses. You have no assurance that an employer will be exhaustive in his search. You do not know the employer; every person is unique and will have a different sense of commitment to the task. The very nature of the request has built in disincentives to the employer. It is very unlikely that an employer will have the interviewing skills to adequately assure whether the employees he is interviewing have information useful to the defense. In turn, witnesses to crimes are very unlikely to voluntarily identify themselves to law enforcement or the defense. A substantial number of

people that I have encountered have the greatest reluctance to involve themselves in a criminal investigation. This is a universal, deep-seated character trait. In the extreme, even in a penalty phase trial, witnesses will not want to participate even where the defendant's life is at stake.

21. In addition, it is not reasonable for successor counsel to rely on the efforts of his predecessor counsel to determine the scope and breadth of his investigation. To do so would be an abdication of his role as an attorney. In fact, predecessor counsel is often in a better position to access the weaknesses and strengths of the People's case once that case has been examined under the scrutiny of a trial. Thus, it should have been readily apparent to successor trial counsel the importance of an exhaustive search for witnesses to the gunshot(s).

22. The general approach to the investigation of the case appears to have been implemented by unstructured visits to the crime scene by trial counsel himself, unassisted by any significant assistance by a criminal investigator, without a thorough canvass of *all* adjoining businesses where employees, customers, or cleaning crews may have been present, and without employment of the most basic tool of investigation, the subpena, to determine the identification of all the employees who may have been present.

23. In my professional opinion counsel was woefully inadequate in the investigation he conducted for Mr. Myers' trial. It is my professional opinion trial counsel's efforts fell far below the standard of practice demanded by the case and *Strickland*.

24. Finally, I am also of the opinion that there was no imaginable strategic reason for failing to undertake an adequate investigation. It was not done for any tactical reason, but out of simple neglect of duty. It is my professional opinion that as to these admitted neglects of

duty, there is no doubt that counsel rendered ineffective assistance of counsel which seriously prejudiced petitioner.

25. Addressing the prejudice prong of *Strickland*, even before the discovery of Enyart and Ramos, the time of death evidence was consistent with the innocence of Mr. Myers. That is, it was consistent with the victim being shot at a time when Mr. Myers alibi was unrefuted. The jury instruction that informed the jury that when choosing between two reasonable circumstances, one pointing towards innocence and one pointing towards guilt, they had to select the innocent inference had keen importance in this case.

26. This was a weak case, evidenced by the deadlocked jury following the first trial.

27. The so called motive evidence in this case was particularly weak, since Cynthia Myers' infidelity with the victim had been known to Mr. Myers for months; this was not one of those volatile reactions following a recent discovery.

28. The value of evidence of gunshots at 9:30 p.m. was extremely powerful to the defense case. Mr. Enyart and Mr. Ramos were not related and both placed the time of the shots within minutes of each other, and both heard two shots. Both were able to tie the night to when all the police activity was at the crime scene (in the case of Enyart) and to having heard about the homicide on the next day (in the case of Ramos). Any diminution in their value was solely attributable to the passage of time. If they had been located and interviewed closer to the time of the homicide, their testimony could have been firmed up. And, as discussed earlier, they would likely have led to other witnesses to the shots and witnesses to Enyart and Ramos talking about the shots. Even if Barbarino's testimony was completely discounted, Mr. Myers' presence 55 miles away at 9:50 p.m. was solid. But for trial counsel's deficient performance, the result of Mr. Myers' trial would have

been different. Evidence that completely undermined the prosecution's theory for the time of the shooting and set the time when Mr. Myers' alibi was unrefutable would clearly have established a reasonable doubt.

29. Based on my review of the material provided, I have concluded that the pretrial investigation and preparation in this ease was at best preliminary, superficial, and omitted a series of basic investigative steps.

30. Counsel's inadequate pretrial preparation resulted in counsel's overall inadequate performance at Mr. Myers' trial.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this third day of March 1999, at Santa Monica, California.

/S/ Barry Levin
Barry Levin
Attorney at Law

BARRY LEVIN
ATTORNEY AT LAW
11640 San Vicente Boulevard, Suite 201
Los Angeles, California 90049
Telephone (310) 208-66070 FAX (310) 785-0871

EDUCATION

POST GRADUATE	San Fernando Valley College of Law, Juris Doctorate Degree, *Cum Laude, 1980*, Editor in Chief, Law Review 1979-1980
UNDERGRADUATE	California State University Northridge, Bachelor of Arts Degree, Urban Studies, 1976
	Los Angeles Valley College, Associate in Arts Degree, Administration of Justice, 1975

BAR ADMISSIONS

California Supreme Court, 1980
Central District of California, 1981
United States Court of Appeals for the Ninth Circuit, 1982
United States Supreme Court, 1984

PROFESSIONAL EXPERIENCE

April 1982 to Present	Law Offices of Barry Lavin
Sept. 1981 to to April 1982	Corkins, Collins, Kuhn and Fremont Trial Attorney
Feb. 1981 to Sept. 1981	Los Angeles County District Attorney's Office Deputy District Attorney
April 1969 to Jan. 1981	Los Angeles Police Department Police Officer

Class valedictorian; assignments included patrol, detectives, training officer, vice and narcotics enforcement, attended in-service training schools including FBI Instructor Development Course, homicide and detective school, sharpshooter .38 caliber pistol.

PROFESSIONAL EXPERIENCE (Continued):

Criminal Defense:

Counsel in eleven death penalty cases (no death judgments). Litigated writs of Habeas Corpus, State courts of California and Louisiana; Federal Court, Central District of California; Western District, Arkansas.

Trial Attorney in several high-profile jury trials including *People v. Hernandez*, won acquittals in "10th & Dalton" (Los Angeles Police Captain charged with conspiracy and vandalism, *People v. Ellsmore*), "Hollywood

Burglary Scandal" (Los Angeles Police Officer charged with burglarizing businesses on duty, *People v. Carter*). Succeeded in obtaining life sentences in penalty phase of death penalty cases: *People v. Hawkins* (son of Watts grocer accused of double homicide with prior 1st Degree murder conviction, *People v. Drescher* (Hare Krishna accused of contract killing with prior 1st Degree murder conviction), *Eric Menendez* and *People V. Watley*. Defended Los Angeles Officer Jimmy Pearson (charged with planting bomb on athletes' bus during 1984 Olympic Games), *People v. Weible* (kidnap and attempted rape of a Van Nuys Municipal Court Judge, case dismissed after two hung jury trials), and Ivan Nagy (boyfriend of Heidi Fleiss).

Accepted for Appointment to Represent Indigent Capital Defendants – Attorney, Central District Capital Case Panel, Los Angeles County Superior Court (1992 – present).

Civil:

Represented plaintiff in State Court jury trial, plaintiff awarded $500,000, *Malmgreen v. RTD*. Defended Stanton Police Chief in Federal civil rights action. Defended Los Angeles Police Department Commander Maurice Moore; Federal civil rights jury trial; obtained defense judgment.

Conflict Panel for the City of Los Angeles Representing Police Officers in Civil Rights cases, (1998 – present).

Appellate:

Briefed and argued cases before California Appellate, California Supreme Court, 9th Circuit Court of Appeals; published opinions *Yagman v. City of Stanton*, 798 Fed. Rptr.2d, 1230; *Lyons v. City of Los Angeles, People v. Payton.*

Accepted for Appointment – Attorney, Federal Central District capital Habeas Corpus Panel (1994 – present).

Administrative/Labor:

Represented Chiefs of Police: former Long Beach Chief Larry Binkley; attorney for then Assistant Los Angeles Police Chief Bernard Parks; retained counsel for Los Angeles Police Command Officers Association. Counsel of Record in numerous Writ of Mandate actions appealing administrative discipline. Retained Counsel in police pension matters heard before Los Angeles Police Pension commissioners, and Los Angeles Police Department, Board of Rights.

MILITARY SERVICE

June 1965 to 1968	**United States Army June (Airborne Infantry)** Rank: SSG E-6, Honorable Discharge

Two combat tours in Vietnam. Awarded (3) Purple Heart Awards, Bronze Star with "V" Device, Air Medal, Combat Infantry Badge, Paratrooper Wings. Cadre to Cadets, U.S. Military Academy, West Point (1968). Assigned to 1st Cavalry Division, 101st Airborne Division, and 82nd Airborne Division.

PUBLICATIONS

Levin, *Defending the Vietnam Combat Veteran*, Vietnam Veterans Legal Assistance Project, Los Angeles, 1989

Levin, *Defense of the Vietnam Veteran With Post Traumatic Stress Disorder*, (1993) 46 AM JUR TRIALS, 441.

NEWS MEDIA EXPERIENCE

Quoted for expert commentary on litigation issues and/or cases of public interest in *The New Yorker, USA Today, U.S. News and World Report, Los Angeles Times, The New York Times, Chicago Tribune, Wall Street Journal, Los Angeles Daily News, California Lawyer,* and other publications.

Regional and national radio/television appearances including *The MacNeil Nehrer News Hour, Prime Time Live* with Sam Donaldson, *World News Tonight* with Tom Brokaw, *The Today Show,* CNN's *Crossfire, Larry King Live, American Journal, Hard Copy, Court T.V., Good Day LA, Which Way L.A.* (KCRW-FM), and other major-market radio stations nationwide; new commentator, O.J. Simpson trial.

LECTURES/TEACHING

Adjunct professor, Criminal Law, Advanced Criminal Procedure, University of La Verne School of Law, 1995 to present.

Faculty, criminal law, Death Penalty College, Santa Clara University College of Law, 1994 to present.

Lecturer, Character Evidence, to Los Angeles Public Defenders, 1997.

Lecturers, Post-Traumatic Stress Disorder, International Association of Trauma Counselors, Inc., 1993 – 1995.

Series on criminal law to California attorneys for continuing legal education credits, (CACJ, CCBA) 1991, 1992.

Lecturer, criminal law, University of Southern California Law Center, 1987.

Series on veterans issues and law, Veterans Administration, 1981 – 86.

SPECIAL APPOINTMENTS

Member, Board of Directors, Criminal Court Bar Association, 1991 – present, President Elect 1999.

Member and Co-chair, Indigent Criminal Defense Appointments Program Committee, Los Angeles County Bar Association, 1993 – 1998, Chair Death Penalty Qualifications Committee.

Commander, American Legion, Post #18, 1996 .

Commander, Veterans of Foreign Wars, Post #18, 1994.

Pro-bono lawyer, earthquake relief, FEMA Centers, Los Angeles County Bar Association, 1994.

President, Vietnam Veterans Legal Assistance Project to provide free consultation to attorneys nationwide on legal issues regarding Vietnam veterans, 1986 – 1993.

Member,National Advisory Panel regarding distribution of $180 million settlement in Agent Orange toxic tort litigation (appointed by U.S. Chief Judge Jack Weinstein, New York).

Member, Office of Criminal Justice Planning Committee regarding distribution of funds to law enforcement agencies (appointed by California Governor George Deukmejian).

Judge Pro-Term, Beverly Hills Municipal Court, 1985 – 1988.

AWARDS

Recipient of the 1997 Gerry Geisler Memorial Award for Trial Attorney of the Year by the Los Angeles County Criminal Courts Bar Association.

ADDITIONAL

Expert witness, Ineffective Assistance of Counsel, availability of mental state defense *People v. Miles* (1995), *People v. Palm* (1997), San Diego County Superior Court, *Ghent v. Calderon* U.S. District Court, Central District, *Anderson v. Calderon*, U.S. District Court, Northern District; *People v. Visciotti*, District Court, Los Angeles, 1999.

Personal references available on request.

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALAN RICHARD MYERS, Petitioner v. C. A. TERHUNE, Director, California Department of Corrections, Respondent	No. EDCV 98-215 RT (E) **DECLARATION OF EDWARD A. RUCKER**

1. I am an attorney at law and licensed to practice in the State of California. My office is located at 1717 Fourth Street, Third Floor, Santa Monica, California. My telephone number is 310-576-6242. My four-page resume is attached hereto and incorporated herein as though fully set forth. I have tried to a jury 10 death penalty cases and I have represented over 100 cases in which homicide was charged. I am familiar with the standard of diligence required for a criminal trial attorney in this state at the time of Mr. Myers' trial, 1994.

2. I have been asked by Conrad Petermann, Mr. Myers' attorney, to access the representation Mr. Myers received from his trial attorney, Deputy Public Defender John Isaacs, in Mr. Myers' 1994 murder trial. To accomplish this task, I have reviewed an extensive amount of material that I have been provided. I have read, reviewed, and used as a basis for my professional opinion, the following

material: (1) selected portions of three computer disks containing an unedited version of the reporters' transcripts of Mr. Myers' second trial; (2) a 48 page summary of the above transcripts; (3) the reporter's transcript of closing arguments; (4) the reporter's transcript of the hearings on the motion for new trial; (5) the petition for writ of habeas corpus form for federal court, as amended; (6) the petition for writ of habeas corpus and memorandum of points and authorities, as amended; (7) all the exhibits that accompanied the federal habeas petition; (8) respondent's notice of lodgment; (9) respondent's return; and (9) Mr. Myers' traverse.

3. It is my professional opinion that the representation by Mr. Isaacs in Mr. Myers' trial, fell well below the level of professional competence constitutionally required of an attorney in a murder case under the professional standards prevailing in 1994 as required by the Sixth Amendment to the Constitution. In reaching this conclusion, I have in mind the standard set forth by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 688 (1984). The *Strickland* standards posit two requirements. First, counsel's representation must fall below an objective standard of reasonableness under professional norms prevailing at the time of counsel's conduct. Second, a reasonable probability must exist that, but for counsel's deficient performance, the result of the proceedings would have been different.

4. Trial counsel committed serious errors and omissions in the investigation of and preparation for Mr. Myers' trial which individually and collectively amount to constitutionally ineffective assistance of counsel:

A. Trial counsel unreasonably failed to investigate and present readily available exculpatory evidence;

B. Trial counsel unreasonably failed to investigate for witnesses at the automobile agency

to the west of the crime scene to the sound of, or the lack of the sound of, shots from a firearm on the night of the homicide;

C. Trial counsel unreasonably failed to investigate for witnesses employed in the cleaning of the automobile agencies located to the north and west of the crime scene to the sound of, or the lack of the sound of, shots from a firearm on the night of the homicide; and

D. Trial counsel unreasonably failed to investigate through the use of a subpena for the employment records of the automobile agencies to the north and west of the crime scene and the cleaning company used by those agencies for witnesses employed by these employers that may have be witnesses to the sound of, or the lack of the sound of, shots from a firearm on the night of the homicide.

THE OBJECTIVE STANDARD OF REASONABLENESS UNDER PROFESSIONAL NORMS PREVAILING AT THE TIME OF COUNSEL'S CONDUCT

5. Every murder case, and in particular a case that exposes the client to a sentence of life without the possibility of parole, requires thorough representation. Representation of an accused murderer in itself is a mammoth responsibility (*In re Hall* 30 Cal.3d 408,434, 179 Cal.Rptr. 223 (1980)) and the seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance (*In re Jones*, 13 Cal.4th 52, 59, 54 Cal.Rptr.2d 52 (1996)). No lawyer wants to live with the burden of having an innocent client convicted.

6. The demands for investigation are substantial. A lawyer cannot be half-hearted in the application of his or her energies to a case. Once a case has been undertaken, a

lawyer is obliged not to omit any essential lawful and ethical step in the defense, without regard to compensation or the nature of the appointment. Consequently, without a thorough factual investigation, defense counsel incapacitates himself from performing his constitutionally required role. Without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial, or moreover to challenge the hart of the prosecution's theory of the case.

7. The demands of investigation require that counsel see to it that the facts surrounding the events of and witnesses to the crime are investigated. This investigation should be prompt and should explore all avenues leading to facts relevant to the merits of the case. The investigation literally must take counsel, usually vicariously through investigators, to every significant geographic and personal contact that may have pertinent evidence that may exonerate his client. An attorney is only excused from such pursuit if he has reasonable grounds for not doing so.

8. It is only after counsel has performed such an investigation that he can make a reasoned decision to pursue certain defense strategies and abandon others. Adequate pretrial preparation and investigation therefore safeguards a defendant's right to a fair trial and ensures the reliability of the adversarial testing process.

9. All individuals related to the commission of the crime obviously must be interviewed and the state's theory of prosecution must be questioned and challenged, if possible, either legally or factually. Usually, the investigator should be an experienced criminal investigator, familiar with crime scene evidence, court procedure, police investigative techniques, and prosecutorial strategy. This investigation journey is cumulative; the more you learn, the more you find out what you don't know and what you need to know. The gems of the investigation are often found in the most

unlikely places and can only be ascertained if the investigation is thorough.

10. In conclusion, it is my professional opinion that well before the time trial counsel became involved in this case in 1994, there was an abundance of educational and other resource material establishing a high standard of care for the defense of murder cases in California. The minimal aspects of this high standard of care were promulgated in the 1993 Third Addition of the ABA Standards for Criminal Justice Prosecution Function and Defense Function, and it is, therefore, appropriate to judge counsel's conduct in this case by these Guidelines.

COUNSEL'S OMISSIONS FELL FAR BELOW THE STANDARD OF CARE FOR THE DEFENSE OF A MURDER CASE IN CALIFORNIA IN 1994 AND IT IS REASONABLY PROBABLE THAT BUT FOR COUNSEL'S DEFICIENT PERFORMANCE, THE RESULT OF MR. MYERS' TRIAL WOULD HAVE BEEN DIFFERENT

11. Based on my review of the material detailed above, I am of the strong opinion that trial counsel's investigation in this case was woefully inadequate, because it did not in any respect measure up to the minimal standard of care set forth above.

12. The general approach to the investigation of the case appears to have been implemented by unstructured visits to the crime scene by trial counsel himself, unassisted by any significant assistance by a criminal investigator, without a thorough canvass of *all* adjoining businesses where employees, customers, or cleaning crews may have been present, and without employment of the most basic tool of investigation, the subpena, to determine the identification of all the employees who may have been present.

13. The general approach to the case formulated by trial counsel can be described as an alibi defense. It simply

required (1) fixing the time of the shooting and (2) establishing where Mr. Myers was at that time. Where the crime is committed with a firearm, the most fundamental thing to do is determine who heard or did not hear the gunshot. Where the crime scene was surrounded by other businesses, it was simply a matter of subpoenaing business records to learn who was on duty that night and then, dispatching an investigator to interview those parties. If this was done promptly, not only would Mr. Enyart and Mr. Ramos have been found, but other witnesses as well since both had either been with someone else when they heard the shots or had discussed hearing the shots with someone else.

14. The last person to have spoken with the victim did so by telephone at 7:50 p.m. Mr. Barbarino, a member of the Alcoholics Anonymous chapter that Mr. Myers attended, testified that he talked to Mr. Myers at an A.A. meeting on the night of the homicide, and their converstation may have been as late as 9:30 p.m. when the meeting ended. Unrefuted telephone records introduced at the trial established that a telephone call to Mr. Myers' estranged wife's residence was made at 9:50 p.m. from the Borque's residence where Mr. Myers was staying. The Borques testified that Mr. Myers was at their residence at about the time when the call was made. The Borques were entertaining guests following the funeral of Mr. Borque's father. The A.A. meeting hall was a 55-minute drive from the crime scene (61.4 miles) and the Borque's residence was a 10-minute drive from the A.A. meeting hall (.3 miles). The victim's body was found just before midnight.

15. In my professional opinion, it was essential for trial counsel to resolve who, if anyone, was outside and within earshot to the sound of a gunshot from 7:50 p.m. until midnight. The likelihood of finding such person(s) was great since the business adjoining on the north and west were automobile dealerships with large open lots. Whether

a person so situated heard or did not hear a gunshot would have been highly relevant to the viability of Mr. Myers' defense. With or without the aid of an investigator, such an investigation was very straightforward and relatively easy. With businesses in close proximity to the north and west of the crime scene, each of these businesses had to be combed for such witnesses. That investigation should also have disclosed that a private contractor after 9:00 p.m. did the cleaning for these agencies. Indeed, the police investigation disclosed and identified Mr. Enyart as that contractor. The only way to help insure that all the employees of these businesses had been contacted was to subpena their employment records.

16. In these cases, it is never reasonable to rely solely on police investigation to locate potential defense witnesses. That is a *hornbook* principle. Law enforcement's goals in these cases are not synonymous with the defense's goals. Once the police have posited a suspect, their efforts are generally directed toward finding evidence that supports their premise and not towards evidence that disproves it. Once they have completed this process, they are not going to go back and look for evidence that will disprove their conclusions. This is not out of improper motives, but is the natural response of often working under time pressures and without adequate resources in the resolution of too many cases. This is not a matter of trying to put a case on someone, it is a question of the officer believing that he has the right person and not wasting his limited resources to try to disprove it. This is with the assumption that the officer is operating in good faith and ethically. Where the investigator appears overzealous, like Detective Spidel, defense counsel has even a greater duty to not rely on the information the officer provided. Furthermore, one does not know what questions Spidel, or any officer, asked and what the attitude

of the witness was. Either could be determinative of the information obtained.

17. It is not reasonable to rely on an employer to investigate for employees that may be witnesses. You have no assurance that an employer will be exhaustive in his search. You do not know the employer; every person is unique and will have a different sense of commitment to the task. The very nature of the request has built in disincentives to the employer. It may mean an absence by the employee, possibly at the cost of the employer. If the employee is unwilling to come forward, for the employer to identify the employee to law enforcement could damage the employer's relationship with the employer. Thus, the employer has no incentive to pressure the employee. In turn, witnesses to crimes are very unlikely to voluntarily identify themselves to law enforcement or the defense. A substantial number of people that I have encountered have the greatest reluctance to involve themselves in a criminal investigation. This is a universal, deep-seated character trait. In the extreme, even in a penalty phase trial, witnesses will not want to participate even where the defendant's life is at stake.

18. In addition, it is not reasonable for successor counsel to rely on the efforts of his predecessor counsel to determine the scope and breadth of his investigation. To do so would be an abdication of his role as an attorney. In fact, predecessor counsel is often in a better position to access the weaknesses and strengths of the People's case once that case has been examined under the scrutiny of a trial. Thus, it should have been readily apparent to successor trial counsel the importance of an exhaustive search for witnesses to the gunshot(s).

19. In my professional opinion counsel was woefully inadequate in the investigation he conducted for Mr. Myers' trial. It is my professional opinion trial counsel's

efforts fell far below the standard of practice demanded by the case and *Strickland.*

20. Finally, I am also of the opinion that there was no imaginable strategic reason for failing to undertake an adequate investigation. It was not done for any tactical reason, but out of simple neglect of duty. It is my professional opinion that as to these admitted neglects of duty, there is no doubt that counsel rendered ineffective assistance of counsel which seriously prejudiced petitioner.

21. The value of evidence of gunshots at 9:30 p.m. was extremely powerful to the defense case. Mr. Enyart and Mr. Ramos were not related and both placed the time of the shots within minutes of each other, and both heard two shots. Both were able to tie the night to when all the police activity was at the crime scene (in the case of Enyart) and to having heard about the homicide on the next day (in the case of Ramos). Any diminution in their value was solely attributable to the passage of time. If they had been located and interviewed closer to the time of the homicide, their testimony could have been firmed up. And, as discussed earlier, they would likely have led to other witnesses to the shots and witnesses to Enyart and Ramos talking about the shots. Even if Barbarino's testimony was completely discounted, Mr. Myers' presence 55 miles away at 9:50 p.m. was solid. But for trial counsel's deficient performance, the result of Mr. Myers' trial would have been different. Evidence completely undermining the prosecution's theory for the time of the shooting and setting it when Mr. Myers' alibi was unrefutable, would likely have resulted in a not guilty verdict.

22. I can attest from my own experience and interviews with jurors that such powerful exculpatory evidence does persuade jurors to vote for a not guilty verdict.

23. Based on my review of the material provided, I have concluded that the pretrial investigation and

preparation in this ease was at best preliminary, superficial, and omitted a series of basic investigative steps.

24. Counsel's inadequate pretrial preparation resulted in counsel's overall inadequate performance at Mr. Myers' trial.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this first day of March 1999, at Santa Monica, California.

/s/ Edward A. Rucker
Edward A. Rucker
Attorney at Law

RESUME

EDWARD A. RUCKER
Attorney at Law
1717 Fourth Street, Third Avenue
Santa Monica, CA 90401
Telephone (310) 576-6242

EDUCATION

Boalt Hall School of Law
University of California
J.D. Degree – 1967

University of California at Berkeley
B.A. Degree – 1964

Honors: Speaker of the Graduating Class
Varsity Letterman

CERTIFICATION

Member of the California and New York Bar

Certified Criminal Law Specialist
California Board of Legal Specialization

PROFESSIONAL AWARDS

Selected by the Criminal Courts Bar of Los Angeles as "Trial Lawyer of the Year" – 1992.

Listed in Best Lawyers in America

PUBLICATIONS

Author of Criminal Forms and Jury Instructions, (1993), a four-volume work published by Bancroft-Whitney Co. with annual supplements, which is in it second edition.

Editor of The Death Penalty Manual, published by California Attorneys for Criminal Justice (1990).

Co-author of California Criminal Law Practice, Supplement 1980, California Continuing Education of the Bar.

PROFESSIONAL EXPERIENCE

After a year in the civil litigation department of a private law firm, I joined the Office of the Public Defender. During my 14 years with that office, functioned in every capacity available in an indigent criminal defense agency. I am currently in private practice, specializing in criminal defense.

TRIAL EXPERIENCE

My experience includes every aspect of criminal representation. I have spent substantial periods of time representing clients in preliminary hearings, juvenile court, misdemeanor arraignments and trials and felony arraignments and trials. I have tried in excess of 100 jury trials.

Special Trials Unit:

For a period of four years, I was member of the Special Trials Unit of the Office of the Public

Defender. In this capacity, I was assigned exclusively the most serious and complicated death penalty homicide cases throughout the County of Los Angeles.

I have tried eight (8) capital cases to juries, through the penalty phase.

APPELLATE EXPERIENCE

I have briefed and argued cases before the Superior Court Appellate Department , the California District Court of Appeals, and the Supreme Court of California.

ADMINISTRATIVE EXPERIENCE

For a period of five years, I was Head Deputy in the Office of the Public Defender, in charge at times of both the Pomona and Pasadena Offices. In this capacity, I had direct supervisory responsibility for all the attorneys and clerical support staff assigned to these Judicial Districts.

LECTURES

I have been invited to lecture on numerous occasions throughout the State on various aspects of criminal law at the request of professional associations such as the Continuing Education of the Bar, the California Judges Association, the California Law Institute for Superior Court Judges, the California Public Defenders Association, California Attorney's for Criminal Justice, California District Attorney's Association and

numerous bar associations. A partial list of the more recent lectures is attached.

EXPERT WITNESS

I have been invited to testify as an expert on criminal law before the California Assembly Committee on Criminal Justice, and the American Bar Association Committee on Criminal Reform chaired by Sam Dash.

I have qualified as an expert in criminal law and testified in the California Superior Court, Federal District Court and before several administrative boards.

PARTIAL LIST OF LECTURES

Lecturer at "Qualitative Difference: Capital Defense," sponsored by California Attorneys for Criminal Justice, Monterey, February, 1998.

Lecturer at "Capital Case Defense Seminar," sponsored by California Attorneys for Criminal Justice, Monterey, February, 1997.

Lecturer at 1995 Winter Seminar on Criminal Law sponsored by the Los Angeles County Bar Association, December 1995.

Lecturer at the "Capital Case Defense Seminar" sponsored by California Attorneys for Criminal Justice, Long Beach, February 1994.

Lecturer at "Defending Homicide Cases," sponsored by California Public Defenders Association, February 1993.

Lecturer at "Mental Issues and Defenses," sponsored by California Public Defenders Association, October 1991.

Lecturer at "Death Penalty Defense Seminar, " sponsored by California Attorneys for Criminal Justice, Monterey, February 1990.

Lecturer at "Effective Criminal Trial Tactics," sponsored by Continuing Education of the Bar, Westwood, February 1990.

Lecturer at 1989 California Public Defender Convention, San Jose, April 1989.

Lecturer at California District Attorney's Association "Gang Violence" Seminar, February 1989.

Lecturer at "Death Penalty Defense Seminar," sponsored by California Attorneys for Criminal Justice, Pacific Grove, February 1989.

APPENDIX J

Attorney Conrad Petermann
8306 Wilshire Blvd.
Suite 797
Beverly Hills, CA 90211
(323) 653-4779

Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALAN MYERS Petitioner Vs. C.A. TERHUNE, Director, California Department of Corrections Respondent	CASE NUMBER: EDCV98-215FT(E) **RE:** **DECLARATION OF DANNY E. DAVIS**

I, Danny E. Davis of DDI-INVESTIGATIONS, declare that the following facts are within my person knowledge and that I could competently testify to them if called upon to do so.

I am a California licensed Private Investigator, California license number PI14472, and have functioned in this capacity for the past ten years. Additionally, I am owner of DDI-INVESTIGATIONS.

On Friday evening, February 26, 1999, at 9:00 p.m., I left the crime scene and drove south on Hamner one block to 2nd Street, then east to the freeway. I took the 15 freeway north to the 10 freeway west. Then the 210 freeway to the

Lowell Street turnoff, to Tujunga Canyon north to Foothill. Then west on Foothill to Mt. Gleason. Then north on Mt. Gleason to Kyle and east on Kyle to 7702 Kyle Street. Time was **1 hour, 4 minutes and 40 seconds.** The mileage was **63 miles**. I always drove at the approximate posted speed limit.

I then drove from the Kyle Street address west to Mt. Gleason. Then south to Foothill and west to the 210 freeway. I then took 210 freeway south back to the 10 freeway east to the 15 freeway. Then the 15 freeway south to the 2nd Street turn off. Then west to Hamner and north to the crime scene. The return trip time was **1 hour, 1 minute and 23 seconds**. The mileage was **65 miles**. Again I drove at the approximate posted speed limit.

I declare under penalty of perjury and under the laws of the State of California, that the foregoing facts are true and correct to the best of my knowledge and that I signed this declaration in Riverside, California on the 07th of March, 1999.

/s/ Danny E. Davis
DANNY E. DAVIS

APPENDIX K

K-1

Attorney Conrad Petermann
8306 Wilshire Blvd.
Suite 797
Beverly Hills, CA 90211
(323) 653-4779

Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALAN MYERS Petitioner Vs. C.A. TERHUNE, Director, California Department of Corrections Respondent	CASE NUMBER: EDCV98-215FT(E) **RE:** **DECLARATION OF JANET BOURQUE**

I, Janet Bourque (DOB: 02/10/54), living at 7702 Kyle Street, Tujunga, California, declare that the following facts are within my person knowledge and that I could competently testify to them if called upon to do so.

On the evening of December 08, 1992, I arrived home from the funeral of my husband's father. Besides my husband (Al), 2 or 3 family members were also at our house. They left between 9:00 p.m. and 10:00 p.m. at which time I went to bed. I do not recall seeing Alan Myers that evening. I did not call Cynthia Myers that evening nor do I recall ever calling Cynthia during the time Alan was living with us.

I declare under the penalty of perjury and under the laws of the State of California, that the foregoing facts are true and correct to the best of my knowledge and that I signed this declaration in Tujunga, California on the 06th of March, 1999.

JANET BOURQUE

APPENDIX L

Attorney Conrad Petermann
8306 Wilshire Blvd.
Suite 797
Beverly Hills, CA 90211
(323) 653-4779

Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALAN MYERS Petitioner Vs. C.A. TERHUNE, Director, California Department of Corrections Respondent	CASE NUMBER: EDCV98-215FT(E) **RE:** **DECLARATION OF ALFRED BOURQUE**

I, Alfred Bourque (DOB: 08/16/58), living at 7702 Kyle Street, Tujunga, California, declare that the following facts are within my person knowledge and that I could competently testify to them if called upon to do so.

On the evening of December 08, 1992, I arrived home from my father's funeral. Besides my wife (Janet), 2 or 3 family members were also at our house. They left between 9:00 p.m. and 10:00 p.m. Between 9 and 10 and while the family members were still at our house, I recall Alan Myers coming in and walking past us to his bedroom. I do not recall seeing him the rest of the evening. After the family left I went to bed. I did not call Cynthia Myers that evening nor do I

recall ever calling Cynthia during the time Alan was living with us.

I declare under the penalty of perjury and under the laws of the State of California, that the foregoing facts are true and correct to the best of my knowledge and that I signed this declaration in Tujunga, California on the 06th of March, 1999.

/s/ Alfred Bourgue
ALFRED BOURQUE

APPENDIX M

M

Fourth Appellate District, Division Two, No.
E016578/E020323
S062347

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
SEP -3 1997
Robert Wandruf Clerk
DEPUTY

THE PEOPLE, Respondent

v.

ALAN RICHARD MYERS, Appellant
IN RE ALAN RICHARD MYERS On Habeas Corpus

Appellant's petition for review DENIED

/stamp/ GEORGE
Chief Justice

APPENDIX N

SUPREME COURT OF CALIFORNIA

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ROBERT F. WANDRUFF
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT
June 27, 1997

Office of the Attorney General
110 West A Street, Room 600
San Diego, CA 92101

Re: S062347—In re Alan Richard Myers on Habeas Corpus: Petition for Review

Dear Counsel:

Pursuant to rule 60 of the California Rules of Court, the court has directed that I request an informal response to the above referenced matter, petition served on your office by mail on June 20, 1997. Please address the merits of the

issues previously raised in petitioner's petition for writ of habeas corpus in the Court of Appeal. The response is to be served upon petitioner and filed in this court on or before July 18, 1997. Petitioner will then have ten (10) days in which to serve and file a reply to the informal response.

Please be advised that the instant petition is a petition for review, and a ruling by the court is due on or before August 22, 1997. This request for an informal response should be expedited by your office, and no requests for extension of time are contemplated.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

By: Bridget A. Newman
Deputy Clerk

myers.doc

cc: Conrad Petermann, Counsel for Petitioner
Rec.
Reg.

APPENDIX O

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

FILED

May 21, 1997

COURT OF APPEAL FOURTH DISTRICT

THE PEOPLE, Plaintiff and Respondent v. ALAN RICHARD MYERS Defendant and Appellant	E016578 (Super.Ct.No. CR 51809) OPINION
In re ALAN RICHARD MYERS On Habeas Corpus	E020323 (Super.Ct.No. CR 51809

APPEAL from the Superior Court of Riverside County. Robert G. Spitzer, Judge. (Judge of the Municipal Court, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

ORIGINAL PROCEEDING; petition for the writ of habeas corpus, Riverside County, Robert G. Spitzer, Judge. Petition denied.

Conrad Petermann, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior

Assistant Attorney General, Janelle B. Boustany and Keith I. Motley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Alan Richard Myers appeals his conviction of the first degree murder of Michael Roy Norris, with a special circumstance finding that the murder was committed while lying in wait. (Pen. Code, §§ 187, 190.2, subd. a)(15).) Defendant contends the evidence was insufficient to sustain either his conviction or the special circumstance finding. He also argues that the court below erred in denying motion for a new trial, that his trial counsel was incompetent for filing to investigate additional witnesses, and that the court should have instructed on a lesser included offense. We reject all defendant's contentions and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Mike Norris and his mother owned a motorcycle shop in Norco. On the evening of December 8, 1992, Norris's mother left at approximately 7:10 p.m. At approximately 7:45 p.m., Norris telephoned Jeanne Merced, at whose residence he was then living. He told her he had two motorcycles to finish up, and that he might be home late. He might even spend the night at the shop if the work took too long. At approximately 7:50 p.m., Norris spoke by telephone with a friend, Charles Freeman. Freeman invited Norris to come for dinner. Norris told Freeman he would be finished at the shop in 20 minutes and would be over after that. That was the last communication anyone had with Mike Norris.

The On Guard security agency had its offices in the same complex as Norris's motorcycle shop. On December 8, 1992, just before midnight, one of the security employees found Norris's body lying in the parking lot

behind the motorcycle shop. Norris had been shot once in the back of the head. There was no tattooing around the wound.

Robbery was not the apparent motive. Norris's truck keys were in his hand. His truck was in the parking lot. He still had his wallet, containing $70 and 13 credit cards. He had an additional $40 in his jacket pocket. There was no evidence that anything in the motorcycle shop had been disturbed or taken.

The medical pathologists testified the death occurred sometime during a four-hour period between 8 p.m. on December 8 and midnight on December 9.

Defendant ultimately became a suspect because the victim, Mike Norris, and defendant's wife, Cynthia Myers, were involved in a clandestine romantic relationship.

Defendant married Cynthia Myers in 1985. In May of 1991, they moved to Santa Clarita. In June 1991, during a trip to Mammoth, Cynthia met Mike Norris. They began seeing each other; Cynthia kept the relationship a secret from defendant. Norris was also married. He separated from his wife, Debra, in February of 1992.

By June of 1992, defendant suspected his wife was having an affair. She was making and receiving many telephone calls, and there were many late night telephone calls that would disconnect whenever the defendant answered. Defendant remembered that Cynthia had encouraged him to take a business trip to Colorado over the New Year holiday. He suspected that Cynthia had arranged a rendezvous with her lover in his absence. Defendant confided his suspicions to his best friend, Alfred Bourque. Cynthia was going on a trip with her family in June of 1992. Defendant told Borque that, while she was away, he planned to order their telephone records to find out who Cynthia was calling.

When defendant received the telephone records, he noticed several repeated telephone numbers. These numbers corresponded to places that Mike Norris was living and to the motorcycle shop. Defendant called the numbers that appeared most frequently on the bills. He later determined that Cynthia had been calling Michael Norris. When Cynthia returned home, defendant confronted her with the telephone records. Cynthia claimed that Mike Norris was just a friend that she was helping through a divorce. Defendant did not believe her. He later admitted to Detective Spidle that, despite Cynthia's denials, defendant believed she was having an affair.

In July of 1992, defendant moved out of the family home and stayed with Alfred and Janet Borque. However, defendant often would babysit his children on evenings that Cynthia had classes, and would sometimes spend the night.

After defendant moved into their house, the Borques discovered that defendant was an alcoholic. In the evenings, defendant would come home from work and would frequently be passed out on the couch by 8 or 9 p.m. Alfred Borque found an empty vodka bottle in the cushions of the couch where the defendant slept. The Borques had a full liquor cabinet when defendant moved in; it was emptied by September or October of 1992.

Defendant later admitted to Detective Spidle that he had been drinking heavily during the period of time of his separation from his wife, through the fall of 1992. He told Spidle he was a closet alcoholic, that he would not drink in front of others but drank secretly. He had been a closet alcoholic during his marriage with Cynthia. Defendant started attending Alcoholics Anonymous (AA) meetings in late October of 1992, but he was again drinking after the murder, in mid- to late December.

Defendant also experienced financial difficulties during the fall of 1992. Heavy rains limited his work as a building inspector and masonry construction worker.

Defendant confided in his friend, Alfred Bourque, about Cynthia's affair with Norris. Defendant told Borque that if Cynthia was sleeping in his bed with another man, that would be "one of the lowest" things she could do. Defendant "did not know what he would do" if he ever found out that was happening. Defendant did not think he would be "able to handle it." Defendant wanted to confront Cynthia's lover, and tell him how he was "messing up" defendant's life and family.

Borque counseled against such a face-to-face meeting, saying it was "not a good idea," that "things could get out of hand," and defendant did not know "what size" Norris might be.

Both Alfred and Janet Borque testified that the defendant was not a violent person, and that he seemed sad or hurt, but not angry or rageful when he talked about Cynthia.

In September 1992, defendant took a trip in a four-wheel-drive vehicle. He was gone for three days. Alfred Borque saw defendant with a gun case as he prepared to leave for the trip. Bourque never saw the gun case again.

According to telephone company records, Norris made 25 calls to the Myers residence between November 3, 1991, and June 17, 1992. A call went from the Borque residence, where the defendant was living, to Norris's residence on July 7, 1992, at 10:38 p.m. A call was placed to the motorcycle shop on July 17, 1992, at 4:31 p.m. Defendant apparently called Norris's residence again on August 14, 1992, at 3:06 p.m. There were two calls from the Borque residence to the motorcycle shop on November 25, 1992 at 4:51 p.m. for three minutes, and at 4:56 p.m. for 10 minutes. Between November 21, 1992, and December

7, 1992, the day before the murder, five calls went from the Borque residence to Norris's residence.

On the night before the murder, Cynthia and Norris talked on the telephone for 90 minutes. Defendant tried to call Cynthia, but she ignored him.[1] Suspecting that Cynthia was talking to Norris, defendant called Norris's number. That line was also busy. Defendant called Norris's number several times until the call finally went through; defendant hung up when a male voice answered. Defendant admitted he was angry with both Cynthia and Norris. Although he claimed he did not learn of Norris's death until December 11, 1992, defendant never called Norris's number again after December 7, 1992.

During the investigation of Norris's death, Detective Spidle learned that Norris had a relationship with Cynthia Myers, defendant's wife. In the course of the interview with Cynthia, Detective Spidle found out that defendant owned a handgun. It was kept in a closet or cupboard at the Santa Clarita residence. Detective Spidle asked Cynthia to call him with the serial number from the gun. Cynthia remarked that she did not like guns but would get a neighbor, who was a police officer, to obtain the information from the gun.

The next day, defendant telephoned Detective Spidle without being asked. He gave Detective Spidle the information on the gun. Registration records confirmed that defendant owned a .38-caliber Ruger revolver.

In February of 1993, Detective Spidle found out that a red truck like the one defendant owned had been seen near the motorcycle shop on the night of the killing. He asked defendant to come in, and to bring his gun. Defendant agreed to come, but later called an canceled the

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[1] Apparently, Cynthia had a call-waiting feature on her telephone which let her know when another call was incoming while she was on the line.

appointment. When defendant told Detective Spidle he would not come in to be interviewed, Detective Spidle told defendant he would meet defendant that night.

Detective Spidle interviewed defendant at the Borque residence on February 10, 1993. During the interview, he asked defendant to get his handgun. Defendant went to the room where he was staying, but returned, saying the gun was not there. He claimed he last remembered seeing the gun in September or October, when he went shooting in the desert. If that were the case, Detective Spidle asked, how had defendant called in the serial number from the gun in December? Defendant claimed he had had the information written on a piece of paper in his wallet, because he had considered pawning the gun. He also claimed he had since lost the piece of paper.

Although the bullet that killed Norris was fragmented, forensic information established it was either a .38-caliber or .357 magnum bullet. Defendant's gun was one of about 50 models capable of firing the fatal bullet. Although defendant was aware of the importance of finding his gun, he admitted at trial that he never asked his wife or friends to help look for it.

Defendant owned a distinctive red truck. Jeep Comanches are pickups that were manufactured only between 1986 and 1989. The original owner of the truck had added custom wheels and bumpers, and had a lift kit put on the truck. The exhaust system had been modified, and was louder than normal. He sold the truck in May of 1992. Defendant later bought the truck.

Roy Holden was a mechanic at the motorcycle shop. About six weeks after the murder, he remembered some information he believed might assist the investigation. He told Detective Spidle that he had left work at approximately 6 p.m. on December 8, 1992. While sitting in his car, he noticed a vehicle drive slowly past him. At first, Holden recalled the vehicle was a red Jeep

Cherokee with a tarp or canopy on it. After further reflection, he realized it was a red Jeep Comanche with a camper shell. The Jeep made a rumbling noise as it idled by. Holden saw the Jeep go to the far rear of the parking lot, and back up into a space by the back fence. Holden thought that was unusual, as there were many parking spaces closer to the businesses in the complex. The Jeep's lights went out, but Holden did not see anyone get out. The Jeep had two doors, shiny wheels, and tinted windows on the camper shell. Holden remembered the vehicle as being lower than normal. Holden did not know anything about the suspects or vehicles involved in the case when he volunteered his information.

David McGill also worked at the motorcycle shop. When police initially interviewed him, they showed him photographs of defendant and of defendant's red truck. McGill did not recognize defendant at that time. Six months to a year later, McGill realized that he had seen the person in defendant's photograph before. McGill remembered that, one or two weeks before the murder, defendant came into the motorcycle shop. Defendant asked if "Michael Norris" was there. McGill thought this was unusual because no one ever called Mike Norris "Michael." McGill told defendant he would summon Norris for him; defendant stated, "that's what he needed to know," and left. In March of 1994, Detective Spidle showed McGill a photographic lineup. McGill selected defendant's photograph.

Within a week after the homicide, the owner of the security business found an empty vodka bottle in the landscaped area of the parking lot. The bottle was in good condition, suggesting it had not been there long.

Scott Hill, a patrol officer for the security company, told police he had seen a red Jeep Comanche in the parking lot approximately two or three weeks before the killing. Police showed Hill photographs of a number of vehicles.

Hill identified defendant's red Jeep Comanche as the vehicle he had seen. Hill recognized the truck because a Jeep pickup was unusual, and because of the distinctive camper shell. Hill used to work for the manufacturer of that particular camper shell.

Defendant denied he had ever visited the motorcycle shop. Defendant claimed he knew the motorcycle shop was located in Norco because of Cynthia's calls to the shop he had seen on the telephone bills. However, telephone records listed the location of the motorcycle shop number as Corona or Arlington.

Evidence was presented at trial that defendant appeared jealous of his wife's relationship with others. After defendant moved out of the Santa Clarita house, Cynthia rented a room to a college student, Brian Moyer. Sometime between December 1992 and February 1993, after the homicide, there was a party at the house while defendant was present. Moyer's friend, Mark Lorenzana, attended the party. During the course of the evening, Lorenzana and Cynthia flirted with each other. Three or four days later, defendant had made a point of finding out where Lorenzana worked, and accosted Lorenzana outside his workplace. Defendant told him that what Lorenzana had done at the house was wrong, and that defendant did not want Lorenzana to visit Moyer at the house any more.

In March of 1993, Joesph Kenworthy contacted Cynthia to ask if she would accompany him to an awards dinner some weeks later. Kenworthy arranged to meet Cynthia first, and they agreed to have dinner. Cynthia told Kenworthy that her ex-husband was watching the children and, to avoid an unpleasant scene, arranged to meet Kenworthy at another location. Kenworthy returned several weeks later to pick up Cynthia for the awards banquet. Kenworthy noticed a red truck, with a man and two children, stopped at a stop sign. The truck was still at the stop sign when Kenworthy again passed that location

some minutes later. When Kenworthy took Cynthia home later that night, the same red truck was parked in Cynthia's driveway. Cynthia told Kenworthy the truck belonged to her husband.

Defendant denied any involvement in the killing. He presented an alibi defense. He testified that he got off work shortly after 3 p.m. on December 8, 1992. He went home to the Borque residence where he took a shower and left again at approximately 4 p.m. He stopped to get some food, and then went to a park. As he sat in the parking lot, defendant ate, read a book, and napped. He was at the park for about three hours. While he was at the park, Cynthia paged him. Defendant went to a pay telephone and returned her call. Although defendant normally used a telephone card when calling from a pay telephone, on this occasion he used change to call Cynthia.

At approximately 7:25 p.m., defendant left the park to go to an 8 p.m. AA meeting. Defendant did not remember speaking to anyone on his way into the meeting hall. He also did not remember what he did at the break. He did not participate in the meeting. About 50 to 70 people attended the meeting. No rosters were kept of who attended the meeting. The meeting ended at approximately 9:30 or 9:45 p.m. Defendant spoke with another AA member, Mike Barbarino, after the meeting. Then defendant went home to the Borque residence.

When Detective Spidle interviewed him, defendant had provided the detective with the names of several people who attended the AA meeting. Spidle contacted several of them, but none, other than Barbarino, was able to provide an alibi for the defendant.

Barbarino testified that he saw defendant after the meeting on December 8, 1992, perhaps as late as 9:45 p.m. The prosecutor impeached Barbarino's testimony that he saw defendant at the AA meeting. When Detective Spidle first interviewed Barbarino, Barbarino did not remember

who defendant was. The prosecutor also played a taped interview with Barbarino. Barbarino at first said he had seen defendant at 7:35 p.m. on December 8, but when Detective Spidle tried to test his recollection, Barbarino became uncertain at what point on December 8 he had seen defendant. Barbarino admitted he might not have talked to defendant until after the meeting.

Barbarino's wife also testified in rebuttal. She stated that she attended the AA meetings with her husband, but she had not met defendant by December 8, 1992. In fact, she did not recall meeting defendant until after February.

The prosecutor attacked defendant's alibi, but also presented evidence that the meeting hall was 55 minutes away from the crime scene. Even if Barbarino had seen defendant after the meeting at 9:45 p.m., defendant could have been at the motorcycle shop as late as 8:55. Norris was killed sometime after 7:50 p.m., when he talked to Charles Freeman.

The prosecutor also obtained the telephone records from the pay telephone defendant said he had used to return Cynthia's page on the afternoon of December 8. The records of calls did not substantiate that defendant had made a call from that telephone as he had claimed.

Defendant was tried for the murder of Mike Norris after the grand jury returned an indictment accusing him of the crime. The indictment further charged that defendant had used a handgun in the commission of the offense, and included a special circumstance allegation that the murder had been committed while lying in wait.

Defendant's first trial resulted in a hung jury. Upon retrial, the jury found defendant guilty of first degree murder, and found the firearm and special circumstance allegations true. The court denied defendant's motion for a new trial. Defendant received a determinate term of four years for the firearm enhancement, plus a life term without

possibility of parole for special circumstance murder. Defendant now appeals.

DISCUSSION

I. Sufficient Evidence Supports the Jury Verdicts

Defendant first contends the evidence was sufficient to support neither his conviction of murder, nor the special circumstances finding of lying in wait. We disagree.

"We need not be convinced beyond a reasonable doubt that the murders were premeditated. Our inquiry on appeal 'in light of the whole record [is] whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (*People* v. *Davis* (1995) 10 Cal.4th 463, 511 [41 Cal.Rptr.2d 826, 896 P.2d 119] [hereafter *Davis*]; see *Jackson* v. *Virginia* (1979) 443 U.S. 307, 318-319 [61 L.Ed.2d 560, 573-574, 99 S.Ct. 2781].) The standard of review is the same when the People rely mainly on circumstantial evidence. (*People* v. *Stanley* (1995) 10 Cal.4th 764, 793 [42 Cal.Rptr.2d 543,897 P.2d 481]; see also *People* v. *Bean* (1988) 46 Cal.3d 919, 932 [251 Cal.Rptr. 467, 760 P.2d 996] [conviction based on circumstantial evidence will be affirmed if circumstances reasonably justify trier of fact's findings].)" (*People* v. *Sanchez* (1995) 12 Cal.4th 1, 31-32.)

The evidence presented to the jury showed motive, opportunity, and consciousness of guilt. (*People* v. *Daya* (1994) 29 Cal.App.4th 697, 709.) The victim was having an affair with defendant's wife. Defendant was understandably upset about this; he was angry both with Cynthia and with Norris. Other evidence showed defendant to be jealous of his wife's attentions to others; defendant went to length of tracking down Mark Lorenzo at his place of business to warn him off, after a casual

encounter between Cynthia and Lorenzo. There was substantial evidence of motive.

Defendant denies the evidence was sufficient to show opportunity; he focuses on only part of the evidence, insisting that the killing must have taken place close to midnight, rather than nearer to 8 p.m.,[2] and that his alibi was "substantiated" on and after 8:30 p.m. on December 8.

Defendant ignores the expert testimony, which could not place the time of death more specifically than a four-hour window between 8 p.m. and midnight, even when rigor mortis was taken into account.

Further, the evidence as a whole did not conclusively, or even certainly, establish any alibi for defendant. Only one person in the 50 to 70 who attended the AA meeting remembered the defendant, and that witness's wife testified that she did not meet defendant at all until the following February. Defendant's story about his whereabouts and activities on the day of the murder was not substantiated. He could not prove he was at the park, as he said, until the time of the AA meeting. Telephone records did not support defendant's assertion he used a pay phone as he claimed. Even if defendant's alibi witness were believed, no one saw him at the AA meeting until perhaps as late as 9:45 p.m. A motorcycle shop employee placed defendant's truck in the parking lot at 6 p.m. on the day of the murder. Defendant's alibi was altogether

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[2] At the time the body was discovered, it was not clear whether the victim was deceased. Paramedics tried to resuscitate Norris. There was evidence that chest compressions forced blood from Norris's nose. It was very cold that night, and "steam" could be seen rising from the body. There was also testimony about rigor mortis; movement in the small muscles of the victim's jaw at the time he was discovered possibly indicated an absence of rigor mortis. Rigor mortis can be delayed by cold temperature; it is normally perceptible from two to four hours after death.

doubtful, and even if credited by the jury, did not preclude defendant's opportunity to commit the murder.

Defendant also had the means to commit the murder. Although the bullet that killed the victim was fragmented and unsuitable for exact matching, it could be analyzed sufficiently to show it was fired by one of about 50 or so models on the market. Defendant happened to own just such a handgun. Defendant's gun disappeared without any real explanation, and thus was unavailable for ballistic tests. In addition, although defendant claimed he last saw the gun in September of 1992, he was able to supply the serial number and other information to police after the murder inquiry began. Defendant explained this by saying he had had the information written on a piece of paper in his wallet, but that he had since lost that paper. When police called defendant to bring in the gun, defendant at first agreed, but then abruptly canceled the appointment.

The circumstances surrounding the disappearance of defendant's gun, as well as other facts, also pointed to consciousness of guilt. The jury reasonably could have concluded, on the evidence presented, that defendant lied about the missing gun, and in fact that he had disposed of it. He was able to supply information on the gun in December o f 1992, after he supposedly lost it. He had no explanation for how it became lost. He claimed he was able to supply the information because it was written in his wallet, but he claimed to have lost the paper, too. If defendant knew the gun was missing, why did he initially agree to bring it in to police? Why did he suddenly cancel his appointment with police and delay speaking with them? Although defendant knew the significance of finding the gun, which presumably would clear him if he were innocent as he claimed, he admittedly never made any real effort to look for it.

The jury may well have believed defendant lied about not having been to the motorcycle shop. Defendant spied on other people whom he felt may be involved with his wife. He found out where Mark Lorenzo worked, after Lorenzo had once attended a party at defendant's Santa Clarita residence; defendant accosted Lorenzo at work to warn him not to come to the house again. Defendant said he had never been to the motorcycle shop, but he knew it was located in Norco. His claim that he knew the shop was in Norco from the records of Cynthia's calls was false, as the telephone records listed a different exchange for the motorcycle shop telephone number. David McGill recognized defendant as a person who had physically come into the shop and asked for the victim. Other witnesses saw a truck like defendant's at the location some time before the murder, and again on the day of the murder.

The jury could also have concluded defendant lied about his three-hour unsubstantiated sojourn in the park, particularly since telephone records failed to confirm he made a pay phone call as he clamed. The jury may also have concluded he lied about his alibi, further evidencing consciousness of guilt.

Defendant claims the evidence most raised a mere suspicion he was the killer. (*People* v. *Reyes* (1974) 12 Cal.3d 486, 500.) While the evidence is circumstantial, it was sufficient for a reasonable trier of fact to conclude defendant had motive, opportunity, and means to commit the murder; his vehicle was placed on the scene within hours of the murder; he had previously investigated the victim and the scene; he may have lied about his whereabouts; and his alibi was either not substantiated or did not eliminate defendant as the murderer.

Defendant's reliance on *People* v. *Blakeslee* (1969) 2 Cal.App.3d 831, is misplaced. "*Blakeslee* was aptly distinguished by the Supreme Court in the most recent case, *People v. Thomas* (1992) 2 Cal.4th 489 [7 Cal. Rptr.2d 199,

828 P. 2d 101]. 'In *Blakeslee,* proof of guilt consisted principally of evidence of opportunity and motive, together with a false alibi indicating consciousness of guilt. The court reversed Teresa Blakeslee's conviction because evidence was insubstantial in light of what was not proven, principally the prosecution's failure to produce the murder weapon or link a specific weapon with the crime, *and because the evidence could plausibly be interpreted consistent with the guilt of defendant's brother.* The *Blakeslee* court discounted the false alibi as evidence of consciousness of guilt, finding it to be of less that solid value because the *defendant plausibly explained why she lied* (*i.e., she wanted to protect her brother*) . . . In contrast, the many inconsistencies in defendant's statements [in *Thomas*] are not so easily resolved. No plausible explanation for them appears, apart from defendant's wish to shift suspicion away from himself. Comparison of the evidence in this case with that in *Blakeslee*, for whatever a comparison is worth, thus fails to reveal any deficiency of proof warranting reversal.' (*People* v. *Thomas*, *supra*, 2 Cal.4th at p. 516.)" (*People* v. *Daya*, *supra*, 29 Cal.App.4th 697, 711, italics added, original italics omitted.)

Here, in contrast to *Blakeslee*, there was strong evidence of motive. Defendant had a connection to a particular gun which could have been the murder weapon. As in *Blakeslee*, the jury could infer consciousness of guilt if it believed defendant lied about his actions or whereabouts, but unlike *Blakeslee*, defendant did not offer a plausible explanation for, e.g., the disappearance of the gun or his lies.

We conclude that the evidence was sufficient to sustain the conviction.

The evidence is also sufficient to sustain the special circumstance finding. The special circumstance of lying in wait requires waiting, watching and concealment; concealment need not be concealment of the person, but

may be concealment of purpose, or may be such concealment that "puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise. [Citation] It is sufficient that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim. [Citations]" (*People* v. *Sassounian* (1986) 182 Cal.App.3d 361, 407.)

Here, evidence was presented that defendant investigated the scene, that he was present at the motorcycle shop at approximately 6 p.m. on December 8, about two to six hours before the killing, that the rear of the motorcycle shop premises, where the victim was working, was visible through a large, well-lit window, which would allow a watching person to see when the victim was about to leave. Indeed, the victim was shot just as he reached his vehicle. The victim's truck was parked partly behind a small enclosure for a trash dumpster. The victim was shot with a single bullet through the back of the head. The shot was not a contact wound, and may have been made from some distance away. This evidence reasonably supports the inferences that defendant waited and watched for a substantial period of time, that he concealed himself and his purpose, and that he attacked by surprise from a position of advantage. (*People* v. *Sims* (1993) 5 Cal.4th 405, 433; *People* v. *Morales* (1989) 48 Cal.3d 527, 557; see *People* v. *Edwards* (1991) 54 Cal.3d 787, 825.) There was substantial evidence of lying in wait.

II. The Trial Court Properly Denied the Motion for a New Trial

Defendant moved for a new trial below based on newly discovered evidence. Defendant presented the evidence of two new witnesses. The owner of a cleaning

company, Scott Enyart, had just given assignments to his workers who were cleaning an auto dealership located on property to the north of the security guard company at approximately 9 p.m. At about 9:30, Enyart thought he heard two gunshots, about two seconds apart, coming from a southerly direction.

Across the street to the west of the motorcycle shop was another auto dealership. The dealership was open, as there were still customers present. At 9:25 p.m., a salesperson thought the shots came from a convenience store, a quarter mile to the southeast.

Detective Spidle indicate, however, that he had interviewed Enyart soon after the shooting; Enyart had told Spidle that neither he nor his employees remembered hearing any gunshots near the back of the motorcycle shop. Spidle also never found any casings or bullet strikes indicating there was a second shot.

The trial court denied the motion for new trial based upon this newly discovered evidence.

"The standard of review of an order denying a motion for a new trial based on newly discovered evidence was established by this court in 1887: 'To entitle a party to a new trial on the ground of newly discovered evidence, it must appear, -- "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." . . . [¶] "Applications on this ground are addressed to the discretion of the court below, and the action of the court below will not be disturbed except for an abuse of discretion, . . . '" [Citations.]" (*People* v. *Martinez* (1984) 36 Cal.3d 816, 821; accord *People* v. *Delgado* (1993) 5 Cal. 4th 312, 328.)

Under this standard, we find no abuse of discretion. Enyart's evidence did not qualify as "newly discovered." It could, with reasonable diligence, have been discovered before either of defendant's trials. Moreover, we do not believe the evidence was such to render probably a different result on retrial.

Defendant urges the evidence would have affected the verdict because (1) Enyart's and the automobile salesman's evidence establish 9:30 as the time of the killing, (2) the prosecution's case was dependent on the theory that the murder occurred between 8 and 8:30 p.m., and (3) defendant's only window of vulnerability was between 8 and 8:30 p.m.

Defendant's premises are incorrect. The prosecution's case was not necessarily dependent upon the murder having occurred between 8 and 8:30 p.m. In addition, defendant's alibi was less than rock-solid. The jury could have discredited his alibi evidence altogether.

The new evidence was also questionable and did not definitively establish the time of the murder. After Enyart was contacted by defense investigators in preparation for the new trial motion, he gave an interview to prosecution investigators. Enyart admitted he could not be sure what night he heard the gunshots. He further admitted he wasn't sure what he told the detective who interviewed him near the time of the crime. Enyart admitted the possibility that he made no connection between the shots he heard and the murder, and that he may have told Spidle he heard no gunshots. Enyart even related that he talked to a uniformed officer at the crime scene on the night the victim was found, but did not remember whether he told the officer about the gunshots.

The automobile salesman believed the shots he heard came from a convenience store, some distance to the

south. He did not remember what date he heard the shots, although he associated it with the death of Norris.

Neither witness was certain what date they heard shots. Enyart thought what he heard emanated from a vacant lot south of his location; the automobile salesman, who was directly across the street from the site of Norris's death, believed he heard shots some distance to the south. Enyart did not deny that he may have told Detective Spidle, as Spidle had recorded, that he heard no shots. Enyart's testimony, if admitted at a new trial, would be immediately and readily impeached by Spidle. Both Enyart and the automobile salesman failed to report what they now believe they heard. Enyart even admitted he made no connection between the shots he thought he heard and the killing. The apparent absence of belief of either witness that the gunshots they now think they heard were connected to the death of Norris, would also seriously affect the weight of their testimony. We discern no reasonable probability that the addition of such speculative, impeachable evidence would alter the result upon a retrial. The trial court did not abuse its discretion in denying the motion for a new trial.

III. Defendant's Counsel Was Not Ineffective in Failing to Subpoena the Employment Records of Neighboring Businesses to Locate Possible Witnesses

Defendant contends his trial counsel was incompetent because he failed to subpoena and interview all the employees at the various automobile dealerships in the area to determine if anyone had heard shots on the night of the murder.

A claim of constitutionally ineffective assistance requires the defendant to show, first, that counsel's performance was deficient – i.e., that it "fell below an objective standard of reasonableness," (*Strickland* v. *Washington* (1984) 466 U.S. 668, 688 [80 L.Ed.2d 674,

104 S.Ct. 2052]) – and, second, that defendant was prejudiced by counsel's deficient performance – i.e., that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.) "A reasonable probability is a probability sufficient to undermine the outcome." (*In re Jackson* (1992) 3 Cal.4th 578, 601, disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6.)

Due diligence does not require defense counsel to exhaust every potential source of evidence. We note that the private attorney who represented defendant at his first trial also did not conduct the inquiry defendant now urges should have been done.

Both defendant's first attorney and the public defender who represented him at the second trial were aware of the police investigation of the case. That investigation included many contacts with persons employed at the surrounding businesses. That investigation also took place well before suspicion focused on defendant, and thus also before the police had any idea of defendant's "window of vulnerability" between 8 and 8:30 p.m. The police investigation included a specifically mentioned contact with Enyart. He told police he heard no gunshots. Even at the date of the new trial motion, Enyart admitted he might have told the officer that. Thus even if the defense had discovered and interviewed Enyart much closer to the time of the killing, it is unlikely that any information would have been developed.

In addition, although employees at the auto dealerships were well aware of the killing, not a single person ever came forward with any information. The defense posted reward posters in the area, asking for witnesses, but produced no leads.

Given these facts, we cannot fault defense counsel's performance in failing to further pursue avenues that had so far proved fruitless. As with any investigation, there is

always something else that might have been done, but we are not entitled to judge with hindsight. Defendant has failed to show his counsel's performance was deficient. His claim of ineffective assistance of counsel fails.

IV. Defendant Was Not Entitled to Instructions on Provocation

Defendant asked the trial court to instruct the jury that evidence of provocation could be considered in determining the degree of murder (CALJIC No. 8.73).

The victim had suffered a small laceration and bruising inside his lower lip. There was no outside bruising. The injury was caused either by something hitting the victim in the mouth, or the victim's mouth striking something. It was a blunt force injury, and could have been caused by a fist, or by a fall. The victim also had a small cut on the ring finger of his right hand. The wound had occurred within 48 hours of death. Defendant surmised that the victim might have hit something with his fist to cause this injury. From these two bits of evidence, defendant conjectures that the victim might have been in a fistfight with the killer, and then concludes that, if the jury believed the defendant was the killer, the fight might provide provocation which would affect the degree of murder.

Defendant was not entitled to instructions on provocation. As the Attorney General states, "Even assuming the injuries to the victim's lip could have been caused by someone [defendant] hitting the victim with a fist, [defendant must still explain] how his punch to the victim's face provoked him to then shoot the victim in the back of the head." To imagine that a small cut on the victim's hand translates into provocation for murder requires a crystal-ball vision that we do not possess.

There was no evidence of any provocation; defendant was not entitled to instructions not supported by any evidence. (*People* v. *Neely* (1993) 6 Cal.4th 877, 897.)

V. Habeas Corpus Issues

Belatedly, defendant has filed a petition for writ of habeas corpus which he has asked to be consolidated with his appeal. He claims he is entitled to relief because the prosecutor allegedly suppressed material evidence, because defendant has found newly discovered evidence, and because his trial counsel was assertedly incompetent in ferreting out the suppressed or the newly discovered evidence. Defendant's contentions are without merit.

A. The Prosecution Did Not Suppress Material Evidence

Defendant claims the prosecution did not fulfill its Fourteenth Amendment obligation to disclose evidence. (See *United States* v. *Bagley* (1985) 473 U.S. 667, 674-678 [87 L.Ed.2d 481, 488-492, 105 S.Ct. 3375].) The duty apples only if the evidence is "both favorable to the accused and 'material either to guilt or punishment.'" (*United States* v. *Bagley*, *supra* 473 U.S. 667, 674 [87 L.Ed.2d 481, 488-489].)

"Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses. (See *United States* v. *Bagley*, *supra*, 473 U.S. 667, 676 [87 L.Ed.2d 481, 490].)

"Evidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.'" (*In re Sassounian*, *supra*, 9 Cal.4th 535, 544.) A "reasonable probability" that the result would have been different is a "probability sufficient to 'undermine[] confidence in the outcome.'" (*Ibid.*)

Defendant identifies three classes of evidence he claims the prosecution wrongfully suppressed: (1) evidence of the time of death, (2) evidence that the motorcycle shop had large cash dealings with Argentineans, and (3) evidence that Detective Spidle coerced McGill into an identification of defendant and defendant's truck.

1. "Time of Death" Evidence Was Not Suppressed

In the early months of the investigation, the police had not focused on defendant as a suspect. Patricia and Ray Thomas were neighbors of Norris's ex-wife, Debbie. They were suspicious of activities at Debbie Norris's house; "it did not appear . . . to be the home of someone in mourning." The police undertook a surveillance of Norris's ex-wife, using the Thomases' house as an observation post. While the police were in the Thomas house during the stakeout, Patricia Thomas allegedly heard Detective Spidle say that Norris had been killed between 10 p.m. and midnight. Although Ray Thomas was also present during the stakeout, he does not aver that he heard any such remark.

Defendant also asserts that detectives interviewing some of the motorcycle shop employees questioned them as to their activities between 9 p.m. and 10 p.m. on the night of the homicide.

From these threads, defendant extrapolates that because detectives occasionally mentioned times other than 7:50 to 8:30 p.m., police must have believed the killing took place later than 8:30; that belief must have been based upon Enyart's report of hearing shots at 9:30; therefore, the police must have deliberately suppressed Enyart's report.

The detectives who interviewed the motorcycle shop employees explained that the employees had given explanations of their whereabouts up to 9 p.m. If any

question was asked about 9 p.m. to 10 p.m., it was to follow up on a time not previously covered in the witness's statement. We also note that, had Detective Spidle remarks been based upon Enyart's report of hearing gunshots at 9:30 p.m., he would hardly have told Patricia Thomas that Norris was killed between 10 p.m. and midnight. If indeed Detective Spidle did say he believed Norris was killed between 10 p.m. and midnight – a statement not heard by the other witness in the room – that belief substantiates Detective Spidle's assertion that in fact Enyart had said he did not hear any shots. In short, there is no evidence that Enyart told the police anything other than what the police reported: that is, that he heard no shots.

Thus, nothing was suppressed; certainly nothing favorable to defendant or material to guilt or innocence.

2. Police Did Not Suppress the Argentinean Purchases

Defendant's post-trial investigations has now brought forth evidence that, although the motorcycle shop was in severe financial difficulty, Norris contracted to supply several hundred thousand dollars' worth of motorcycles and parts to some Argentinean buyers. The transactions were made in cash. Although the motorcycle shop got behind in some deliveries to the Argentineans, an employee told defense investigators that eventually all the parts were delivered. Another employee told defense investigators that the Argentineans were upset about delays; the employee did not speak Spanish, but believed the Argentineans had telephoned making threats. In fact, what the Argentineans had demanded was their money back, or delivery of the promised parts.

Defendant claims that the Argentineans cash purchases provide "important evidence of a third party motive," and that "killing the victim would be a strong

warning to the rest of the industry to deliver to the Argentineans what they paid for."

We do not accept defendant's wholly unsupported innendo that non-Americans who pay large sums of cash are necessarily murderous thugs rather than commercial merchants. Although one shop employee thought the Argentineans had been making "threats," he later found out that the "threats" consisted of demands to either furnish the contracted goods or return the purchasers' money. This is commercially reasonable demand, not an illegal threat. The Argentineans were understandably upset a delays in delivery of their goods. Another shop employee told defense investigators that the Argentineans in fact later received all the parts they had ordered.

So far as this case is concerned, the evidence of the Argentineans transactions is evidence of nothing; as such, it could hardly be wrongfully "suppressed." There is nothing favorable to the defense, or material on the issues of guilt or innocence, in the unfounded and speculative prejudices defendant projects onto the Argentinean customers.

3. The Prosecution Did Not Suppress Evidence of a Coercive Identification

Defense investigators interviewed David McGill, who identified defendant at trial as the person who came to the office asking for Michael Norris. McGill told defense investigators that Detective Spidle had cornered him at the office and repeatedly shown him photographs of defendant and defendant's truck. When the defense investigators asked McGill, however, whether being shown defendant's photograph contributed, six months later, to McGill's identification of defendant, McGill responded, "I didn't lie." McGill in fact maintained his belief that defendant was the person who entered the shop.

To the extent there was any evidence that McGill's identification might have been affected by Detective Spidle's conduct, those facts were known to the defense at the first trial. Thus, the record fails to support defendant's accusation of nondisclosure.

Moreover, the evidence that does not exist does not support defendant's inference of improper influence. McGill's first trial testimony suggests that he disliked Spidle's interview techniques and thus did not pay much attention to the photographs Spidle showed him. When he later remembered that defendant had come into the shop, he described the experience as "like a song you have in your head, you can't remember it, but th[e]n all of a sudden later it just comes to you." When defense investigators tried to suggest that McGill's memory may have been influenced, McGll insisted he "didn't lie"; that is, he remembered defendant independently.

In short, defendant's claim that the prosecution improperly suppressed material evidence are based upon nothing but speculation and innuendo. Either such evidence as exists was not suppressed, or there was no "evidence" to suppress. Defendant has failed to present any evidence warranting relief on this ground.

B. There Was No "Newly Discovered" Evidence

Habeas corpus relief will not be granted on the ground of newly discovered evidence unless it undermines the entire prosecution case; the "new" evidence must also "point unerringly to innocence or reduced culpability." (*People* v. *Gonzalez* (1990) 51 Cal.3d 1179, 1246.)

1. The Gunshot Evidence Was Not "Newly Discovered"

As we have noted in our discussion of defendant's new trial motion, Enyart's and Ramos's testimony was not "newly discovered." It could and should, with due

diligence, have been discovered before trial. The evidence was also inconclusive. It did not establish with certainty that gunshots were fired at or near the time of the killing; neither witness was sure of the day he heard shots. Enyart's testimony was impeachable with his statement to Detective Spidle that he heard nothing on the night of the murder.

Nothing connected the shots to the killing. The shots apparently came from a location to the south of the motorcycle shop. In addition, at the crime scene, there was evidence only of a single shot, not two shots.

As we previously determined, there is no reasonable probability the evidence would alter the result.

2. The Argentinean Evidence Does Not Warrant Habeas Relief

The evidence that the motorcycle shop participated in large cash transactions with Argentinean clients does nothing to undermine the prosecution's case. Defendant's thesis, that upset customers must be murderers, simply because they are foreigners who deal in cash, is wholly speculative. The "evidence" is not even relevant; thus, defendant cannot show it "points unerringly" to his innocence.

3. The Evidence that McGill's Identification Was Suggestively Influenced Is Not New

Defendant claims that he has now "discovered" evidence that McGill's identification of defendant may have been improperly influenced by Detective Spidle's interview techniques. As previously discussed, this evidence is not new. Defendant's counsel at his first trial was aware of this evidence. It will not support a claim for habeas corpus relief on the ground of "newly discovered evidence."

4. McGill's Failure to See Holden or a Red Truck Does Not Warrant Relief

Another of defendant's items of "newly discovered" evidence is that McGill allegedly told defense investigators he left work at 6 p.m. on the night of the homicide, but he did not see either Roy Holden sitting in his car, nor did he see a red truck. (See *ante*, at pp. 8-9.)

This evidence was not newly discovered. McGill testified he did not see Holden's car at the first trial. Evidence that McGill also did not see a red truck could, with reasonable diligence, have been obtained before trial.

The evidence, even if credited, does not undermine the entire prosecution case. It merely creates a slight conflict in the evidence, and there are reasonable explanations which could harmonize any such conflict.[3] The evidence does not "point unerringly" to defendant's innocence.

5. Evidence of a Telephone Call to the Victim Does Not Warrant Relief

Defendant points to evidence he claims now to have developed, that the victim received a telephone call at 2 p.m. on the day of the murder, and that the victim was upset after receiving the call. Defendant places the time of the call at approximately 2 p.m., and urges that he was working at a job site without a telephone, and that defendant therefore could not have made the call.

This evidence is not "newly discovered." A motorcycle shop employee told police that Norris had received such a telephone call, and he had been upset afterward. That information was already provided to the defense.

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[3] E.g., it was dark outside when McGill left work on the night of the murder. He might easily have failed to notice other vehicles.

Defendant has not related this evidence to any issues in the case. The fact that the victim received an upsetting telephone call from someone other than the defendant does not "undermine the entire prosecution case" against defendant. Moreover, defendant has not necessarily established that he could not have made such a call. Defendant's employer permitted defendant to leave his jobsite to return pager messages; defendant's employer did not recall whether defendant had left the jobsite to make a telephone call on the day of the murder, but it would not have been unusual for him to do so.

The evidence does not "point unerringly" to defendant's innocence; defendant has hardly demonstrated the relevance of this evidence.

None of the defendant's items of "newly discovered evidence" warrants habeas corpus relief. The evidence either is not new, is not relevant, fails to undermine the prosecution's case, or fails to demonstrate defendant's innocence.

C. Defendant Was Not Denied His Right to Effective Assistance of Counsel

Defendant next claims he was denied his constitutional right to effective assistance of counsel because trial counsel failed to discover and present the "readily available and essential defense evidence" detailed in the preceding arguments.

We have already disposed of defendant's claims his attorney was ineffective for failing to discover and present Enyart's and Ramos's testimony about the gunshots they allegedly heard.

Counsel could hardly be deemed incompetent for failing to present the "Argentinean evidence" as evidence of "third party motive." There is nothing in the evidence of the Argentineans purchases that provides a motive for murder. The evidence is irrelevant.

The other items of evidence (Detective Spidle's in-your-face interview techniques, McGills failure to notice Holden or a red truck, the 2 p.m. telephone call) were known to the defense, and properly assesses as tangential. In any even, no prejudice could have resulted from omitting these items of evidence. (See *Strickland* v. *Washington*, supra, 466 U.S. 668, 684-685 [80 L.Ed.2d 674, 104 S.Ct. 2052].)

None of the claims defendant has raised in the petition for writ habeas corpus is meritorious. The petition is denied.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT FOR PUBLICATION.

/s/ Ward
J.

We concur:

/s/ Ramirez
P.J.

/s/ Richli
J.